

# THROUGH THE LOOKING GLASS: RACIAL JOKES, SOCIAL CONTEXT, AND THE REASONABLE PERSON IN HOSTILE WORK ENVIRONMENT ANALYSIS

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*Humor is laughing at what you haven't got when you ought to have it. . . . Humor is what you wish in your secret heart were not funny, but it is, and you must laugh. Humor is your unconscious therapy.*

—Langston Hughes<sup>1</sup>

## I. INTRODUCTION

Communicating ethnic animosity through humor has long been an American tradition. As early as the seventeenth century, Americans have utilized racial jokes<sup>2</sup> to ridicule the culture, dialect, dress, and traditions of each new wave of immigrants.<sup>3</sup> Images of “little black Sambo,” “the drunken Irishman,” and “the stupid Pole” have helped to define which ethnic groups are accepted and which remain on the fringe of society.<sup>4</sup> Although racial jokes convey a wide variety of messages ranging from

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1. MEL WATKINS, *ON THE REAL SIDE: A HISTORY OF AFRICAN AMERICAN COMEDY* 16 (Lawrence Hill Books 1999) (1994).

2. In this Note, I use the terms “racial jokes” and “ethnic jokes” interchangeably.

3. See JOSEPH BOSKIN, *HUMOR AND SOCIAL CHANGE IN TWENTIETH-CENTURY AMERICA* 28 (1979) [hereinafter *HUMOR AND SOCIAL CHANGE*].

4. See generally CHRISTIE DAVIES, *ETHNIC HUMOR AROUND THE WORLD* 43–50 (1990) (explaining that ethnic jokes reflect the prevailing social hierarchy).

friendly teasing to flagrant racism, when channeling racism and hostility they comprise one of the greatest weapons in the “repertory of the human mind.”<sup>5</sup> Furthermore, while many dismiss jokes as a nonserious form of communication, racial jokes historically have played an important role in the development of American race relations.<sup>6</sup>

In the decades following the civil rights movement, minority groups successfully applied political and social pressure to persuade Americans to oust racial jokes from the public sphere. Joseph Boskin, a leading scholar on ethnic humor, contends that despite the invention of politically sensitive speech, the popularity of racial jokes in the closing decades of the twentieth century skyrocketed nationwide.<sup>7</sup> Ida L. Castro, the Chairwoman of the Equal Employment Opportunity Commission (“EEOC”) stated, “[t]he Commission is seeing a disturbing national trend of increased racial harassment and retaliation at workplaces across the country. This harassment at work sites includes egregious behavior which is reminiscent of the days of the civil rights movement.”<sup>8</sup> This simultaneous resurgence of racial jokes and harassment reveals that discrimination remains a pressing social and legal issue.

In October 2001, the U.S. Court of Appeals for the Ninth Circuit upheld one of the largest jury verdicts ever awarded for a hostile work environment claim based solely on racial jokes in the workplace.<sup>9</sup> The case, *Swinton v. Potomac Corp.*, is particularly important because it unequivocally defines pervasive racial joking in the workplace as actionable discrimination rather than merely offensive teasing.<sup>10</sup> Furthermore, the court announced that its decision should remind employers to keep their workplaces free of racial jokes.<sup>11</sup> Although the case has garnered much media and legal attention,<sup>12</sup> the inevitably

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5. HUMOR AND SOCIAL CHANGE, *supra* note 3, at 28.

6. *See infra* Part II.

7. *See* JOSEPH BOSKIN, REBELLIOUS LAUGHTER: PEOPLE’S HUMOR IN AMERICAN CULTURE 119 (1997) [hereinafter REBELLIOUS LAUGHTER].

8. Press Release, EEOC, EEOC Settles Egregious Racial Harassment Lawsuit Against Louisiana Car Dealership (Aug. 16, 2000), at <http://www.eeoc.gov/press/8-16-00.html>.

9. *Swinton v. Potomac Corp.*, 270 F.3d 794, 799 (9th Cir. 2001). *See also* Henry Weinstein, *Award Over Racism Upheld Appeal*, L.A. TIMES, Oct. 25, 2001, at B1 (stating that the judge affirmed one million in punitive damages for a black employee subjected to repeated slurs at a Seattle area company).

10. *Swinton*, 270 F.3d at 799.

11. *Id.*

12. *See, e.g.*, Weinstein, *supra* note 9; *\$1 Million in Punitives Awarded in Racial Harassment Case*, 6 No. 4 EMP. L. REP. (NEWSL.) 6 (Dec. 2001); Perkins Coie, *Permitting Racial Harassment on the Job Can Be a Million-Dollar Mistake*, 7 No. 1 ALASKA EMP. L. LETTER 6 (Jan. 2002); *Evidence – Remedial Measures – Employment Discrimination Actions*, 16 No. 12 FED. LITIGATOR 311 (Dec.

amorphous fact patterns of hostile work environment claims render the standard for determining what comprises severe or pervasive harassment inherently and intentionally vague.<sup>13</sup> As a result, there is little consensus as to what conduct constitutes an abusive working environment across the circuits.<sup>14</sup> Ultimately, *Swinton v. Potomac Corp.* represents just one interpretation of hostile work environments among a myriad of varying circuit court decisions.

Due to the inherently vague standards governing hostile work environment analysis, many commentators have noted that what conduct will be construed as pervasively hostile depends largely on the court's perspective.<sup>15</sup> Identical fact patterns may be ruled severely hostile by one court but found to be merely offensive by another.<sup>16</sup> This confusion is compounded in racial hostile work environment claims because unlike sexual harassment, racial harassment has not been defined by statute or EEOC regulation.<sup>17</sup> Furthermore, each of the five hostile work environment cases addressed by the U.S. Supreme Court involved sexual harassment claims.<sup>18</sup> Despite the fact that racial and sexual hostile work environment fact patterns are not identical,<sup>19</sup> racial harassment is governed by the principles developed for sexual harassment claims.<sup>20</sup> Thus, courts

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2001); Holland & Hart LLP, *Harassed Employee Has Last Laugh*, 6 No. 11 MONT. EMP. L. LETTER 3 (Dec. 2001); Ogletree, Deakins, Nash, Smoak & Stewart, P.C., *Ninth Circuit Upholds \$ 1 Million Punitive Damages Award*, 6 No. 7 PAC. EMP. L. LETTER 1 (Jan. 2002); *Pervasive Racial Jokes Cost Company \$1 Million in Punitives*, 3 No. 19 EMP. DISCRIM. L. UPDATE 3 (Feb. 2002); Watkins Ludlam Winter & Stennis, P.A., *Here's What Can Happen If You Don't Take Prompt Remedial Action*, 8 No. 11 MISS. EMP. L. LETTER 4 (Feb. 2002).

13. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (Scalia, J., concurring). See also John H. Marks, *Smoke, Mirrors, and the Disappearance of "Vicarious" Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1411-12 (2002).

14. See 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION § 6.7[3], at 6-65 to 6-66 (2001); Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 494 (2002); Penny Nathan Kahan & Lori L. Deem, *Current Developments in Employment Law: Sex and Race Harassment Update*, in 30TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, at 1229, 1271-76 (PLI Litig. & Admin. Practice Course, Handbook Series No. 664, 2001).

15. See ROSSEIN, *supra* note 14, § 6.7[1], at 6-41; Frank, *supra* note 14, at 494-95.

16. See *infra* note 233 and accompanying text.

17. Kahan & Deem, *supra* note 14, at 1268. See, e.g., *Moore v. KUKA Welding Sys.*, 171 F.3d 1073, 1079 (6th Cir. 1999); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 428-29 (7th Cir. 1995).

18. See *infra* note 138 and accompanying text.

19. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998) (finding that although racial and sexual harassment often assume different forms, in general the same standards dictate actionable harassment).

20. *Id.* See also Kahan & Deem, *supra* note 14, at 1268-69.

and juries have less guidance as to what constitutes a racially hostile work environment.

Although hostile work environment claims inevitably assume amorphous fact patterns, which necessitate a flexible, case-by-case analysis, the U.S. Supreme Court has attempted to provide the lower courts with some guidance. Specifically, the Court has held that whether a work environment is hostile can be determined only by considering “a constellation of surrounding circumstances, expectations, and relationships” and evaluating the “objective severity of harassment . . . from the perspective of a reasonable person in the plaintiff’s position.”<sup>21</sup> Despite these instructions, many questions remain unanswered regarding the extent to which social context should be examined and what factors should be included when conducting hostile work environment analysis.

In a recent law review article, *The Social Context Variable in Hostile Environment Litigation*, Michael J. Frank argued that social context should be restricted to an assessment of workplace culture.<sup>22</sup> The crux of this argument holds that the threshold for objectively severe harassment should be raised in workplaces that exhibit a certain cultural coarseness. Therefore, in blue-collar work settings, where racist insults may be more common and theoretically less offensive, a plaintiff would be required to show a heightened level of harassing conduct to demonstrate a hostile work environment.

This interpretation of social context undermines the principles Title VII was designed to protect. First, it provides greater protection from liability to those employers who tolerate discrimination and bigotry in their work environments.<sup>23</sup> Second, the hostile messages conveyed by racial harassment are not lessened by the frequency of their use. Therefore, the regular appearance of racial jokes or insults in a work environment is evidence of severe or pervasive racial harassment. Third, by requiring a plaintiff to demonstrate that he or she suffered harassment that is more severe or pervasive than the harassment that regularly occurs in the defendant’s workplace, this interpretation designates the perspective of a harasser as objectively reasonable.

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21. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998).

22. *See generally* Frank, *supra* note 14, at 464–90 (arguing that the Supreme Court’s instruction to consider social context in hostile work environment claims should be interpreted to mean “workplace culture”).

23. *See* Smith v. Sheahan, 189 F.3d 529, 534–35 (7th Cir. 1999).

In the context of hostile work environment claims based on racial jokes, a broad consideration of social context is particularly vital. Despite America's long history of racist humor and the recent increase in racial joking, many Americans continue to view racial jokes as less harmful than other forms of racial harassment.<sup>24</sup> Although it may be impossible for a judge or juror who has never experienced racial harassment to assume the perspective of someone who has, it is possible to designate America's history of racial discrimination and the social impact of racial joking on targeted minorities as essential components of hostile work environment analysis. The purpose of this Note is to contextualize hostile work environment analysis based on racial joking with the historical and social developments of ethnic humor. Part II provides a fairly detailed overview of racial jokes in American history. An understanding of how racial jokes have influenced race relations within our polyethnic citizenry is an important first step to understanding the social context in which all hostile work environment claims are based. Part III discusses the competing theories of how racial jokes function, the extent to which they can construct power relationships, their ability to permit the public expression of ordinarily impermissible messages, and the psychological effect of hostile joking on targeted minorities. Part IV critiques the workplace culture interpretation of social context and suggests that Title VII analysis would greatly benefit from the incorporation of a sociohistoric perspective into the determination of whether racial joking in the workplace creates an objectively hostile work environment.

## II. RACIAL HUMOR IN AMERICAN HISTORY

### A. THE DEVELOPMENT OF SAMBO AND OTHER CARICATURES OF AFRICAN-AMERICANS

Few racial groups have endured more ridicule and racial stereotyping than African-Americans.<sup>25</sup> Exactly when white colonialists began to stereotype African-Americans as comic figures is unknown; however, it is clear that the "little black Sambo" caricature was invented soon after the first African slaves were brought to America in the seventeenth century. Frivolous, loyal, and happy-go-lucky, Sambo most likely developed from two sources. First, travel diaries and other diaries from that time indicate that whites marveled at their slaves' propensity to boisterously laugh,

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24. See *infra* note 299 and accompanying text.

25. See HUMOR AND SOCIAL CHANGE, *supra* note 3, at 30–31.

dance, and sing.<sup>26</sup> White Americans considered the skill with which African-Americans danced and sang as evidence of their childlike nature and racial inferiority, reinforcing the notion that slavery represented a natural order of the races. Second, the exaggerated Sambo caricature may have stemmed from the obsequious persona many Africans adopted as a strategy for surviving slavery.<sup>27</sup> In his comprehensive analysis of African-American humor, Mel Watkins suggests that playing the part of the happy and hapless slave effectively lowered a master's expectations for productivity, thereby reducing the workload and decreasing the likelihood that a wayward slave would be punished.<sup>28</sup> This Sambo-like persona may have staved off punishment on the plantation; however, it ultimately became one of the most powerful and pervasive symbols of white supremacy.

Beginning in the 1820s, black-face minstrel shows became a favorite form of entertainment among white Americans, and Sambo began to appear regularly on the vaudeville stage. White performers transformed themselves into Sambo by blackening their skin, enlarging their lips, and imitating what many claimed to be authentic representations of the plantation slave's dialect, song, and dance.<sup>29</sup> This nineteenth century Sambo, with his big lips and crazy hair and who dressed in his master's hand-me-down clothes, was a reincarnation of the European court jester that was immediately identifiable to white audiences.

As the popularity of black-face performances grew, two additional caricatures of black culture were introduced: (1) the African-American as a slow-witted plantation slave, and (2) the outrageously dressed city dandy.<sup>30</sup> "Jim Crow" and "Jim Dandy," as the caricatures were called respectively, wreaked havoc on the stage while a white interlocutor served as a benchmark against which their hilarity was measured.<sup>31</sup> For white audiences, Sambo, Jim Crow, and Jim Dandy represented society's alter ego: "[S]low witted, loosely-shuffling, buttock-scratching, benignly-optimistic, superstitiously-frightened, childishly lazy, irresponsibly-carefree, rhythmically-gaited, pretentiously-intelligent, sexually-animated.

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26. WATKINS, *supra* note 1, at 58.

27. *Id.* at 50-51.

28. *Id.*

29. *See id.* at 82.

30. *See id.* at 86-87.

31. Joseph Boskin & Joseph Dorinson, *Ethnic Humor: Subversion and Survival*, in *AMERICAN HUMOR* 97, 111 (Arthur Power Dudden ed., 1987).

His physical characteristics added to the jester's appearance: toothy-grinned, thick-lipped, nappy-haired, slack-jawed, round-eyed."<sup>32</sup>

During the nineteenth century, African-Americans were social outcasts regardless of whether they were enslaved or free. However, even as white Americans struggled to define "blackness" as socially inferior, they were simultaneously intrigued by African-American culture. The heathen songs and dances of "darkest Africa," which had excited the imaginations of Europeans, were seemingly tamed on the stage and served as a source of amusement for white Americans. The black-face performers, who claimed to present authentic black performances,<sup>33</sup> provided the perfect vehicle through which whites could satisfy their curiosity. Black-face performers ascribed the most primitive impulses of human nature to African-American culture. This allowed white audiences a release of the emotions ordinarily repressed by social norms and reinforced the audiences' notions of white supremacy.<sup>34</sup>

#### B. RACIAL JOKES DURING THE NINETEENTH CENTURY

Racial jokes during the nineteenth century reflected two primary social concerns. First, the flurry of jokes that targeted newly arrived immigrant groups reflected the concern of white Americans that they could lose their privileged social position. Such jokes typically defined immigrants as stupid, dirty, or lazy, and emphasized their inalterable differences.<sup>35</sup> Second, racial jokes usually centered on current social concerns. For example, during the Industrial Revolution, entrepreneurs succeeded by constantly evolving with the furious pace of technology.<sup>36</sup> Those who could not keep up, such as immigrants with little exposure to many industrial innovations, were depicted in ethnic jokes as stupid.<sup>37</sup> Thus, many popular jokes at this time ascribed to minority groups an utter lack of sophistication and understanding of newly invented technologies, reflecting the pressures and anxieties created by the new industrial society.

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32. *Id.* at 111.

33. Early black-face performers often claimed to have learned the songs and dances they performed on stage while circulating among black communities to convince audiences of the performance's "authenticity." Most, however, based their roles on folklore and popular misconceptions of the African-American. WATKINS, *supra* note 1, at 85.

34. *See* Boskin & Dorinson, *supra* note 31, at 111.

35. *See* DAVIES, *supra* note 4, at 10.

36. *Id.* at 145.

37. *See* Boskin & Dorinson, *supra* note 31, at 111.

Irish immigrants stood out as the most distinctive group to arrive in America during the nineteenth century.<sup>38</sup> In the 1840s, a population crisis and a lengthy famine brought thousands of unskilled Irish immigrants to America's shores.<sup>39</sup> Consequently, popular jokes at this time featured the Irish as melodic drunkards who had a natural inclination toward politics, but little understanding of modern technologies.<sup>40</sup> Common jokes described the Irish as falling off ladders, being blown up by dynamite, or demonstrating a general lack of culture and class. For example:

A young Irishman whose family was scattered pretty well over the English-speaking portions of the globe emigrated to America. Soon after his arrival in New York he paid a visit to the Bronx Zoo. He halted in front of a cage containing one of the largest kangaroos in captivity. After watching the curious creature for some time in an awed silence, he hailed a keeper.

"What's that thing?" he asked.

"That," said the keeper in his best professional manner, "is a marsupial, a mammal that carries its young in a pouch on its breast, lives on roots and herbs, can jump twenty feet at one leap, is able to knock a human being down with a kick from either hind leg, and is a native of Australia."

"For the love of Hiven!" cried the Irishman, bursting into tears.

"Me sither's married to wan of thim!"<sup>41</sup>

Ethnic joke cycles did not define immigrants only as ignorant greenhorns. In contrast to the Irish, Scottish immigrants appeared in ethnic jokes as canny, hard-working people who would use any means necessary to acquire what they desired.<sup>42</sup>

An advertisement for a funeral parlour in Camden, South Carolina stated: "Bargains in coffins." Fourteen suicides occurred that day.

A Scottish child killed his parents so that he could go free to the annual picnic of the Orphans Society.<sup>43</sup>

The image of the canny yet covetous Scotsman contrasted sharply with the stupid Irishman jokes that circulated simultaneously. Interestingly, racial jokes appear to have impacted the ability of a minority group to assimilate into American society. For example, nineteenth

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38. HUMOR AND SOCIAL CHANGE, *supra* note 3, at 31.

39. DAVIES, *supra* note 4, at 153.

40. *See id.* at 152-60.

41. *Id.* at 154.

42. *See id.* at 151-52.

43. *Id.* at 152.

century commentators noted that the Irish were almost ubiquitously employed in unskilled positions, regardless of their trade, whereas the Scots reputation for “prudence” often enabled them to secure positions in the more lucrative positions of skilled mason and gardener.<sup>44</sup>

As the Irish achieved higher socioeconomic status, other minority groups faced the brunt of twentieth century “stupid immigrant” jokes. In the 1940s and 1950s, ethnic jokes began to circulate depicting Italian-Americans as inept dunces, capable of performing only the simplest of jobs.<sup>45</sup> Donald C. Simmons, a psychiatrist who has researched the psychological nature of humor, suggests that the proliferation of the Italian-American joke cycle in the mid-twentieth century was spurred in part by their successful assimilation and eventual competition with minority groups that had successfully achieved a level of socioeconomic success.<sup>46</sup> Thus, many jokes paired Italian-Americans with African-Americans to illustrate that they also resided at the lowest levels of the racial hierarchy:

Two Negroes racing on a beach near Boston, one shouting to the other, “Last one in is an Italian.”

An Italian gets on a bus in a southern city and takes a seat near the front. The bus driver tells him, “Niggers must sit in the back of the bus.” The passenger indignantly replies, “I’m not a Nigger. I’m an Italian.” Whereupon the driver shouts, “In that case, get off the bus!”<sup>47</sup>

The anti-Italian post-World War II joke cycle, however, was relatively short-lived, dying out almost entirely by the 1970s when their association with organized crime significantly changed their social image from dunce to mobster and effectively rendered “stupid” Italian jokes ridiculous.<sup>48</sup>

Following the death of the Italian-American joke cycle, the Polish were targeted as the next scapegoat of American ethnic humor. Alan Dundes hypothesized that for many Americans, jokes disparaging Polish-Americans became one of the few remaining venues through which antiminority and lower class sentiments could be safely expressed in the years following the civil rights movement.<sup>49</sup> For the first time in American history, expressing anti-African-American sentiments was socially taboo.<sup>50</sup> The reign of politically sensitive speech, however, did not eradicate

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44. *Id.* at 152–53.

45. HUMOR AND SOCIAL CHANGE, *supra* note 3, at 32.

46. *Id.* at 33.

47. *Id.* at 32.

48. *Id.* at 33–34.

49. *Id.* at 36.

50. *Id.* at 34.

antiminority sentiments that many white Americans continued to harbor. As a relatively powerless minority group, Poles could be mocked with little political or social sanctions.<sup>51</sup> Thus, anti-Polish jokes became a paradigm for the antiminority sentiments that had formerly been targeted against African-Americans and other minorities.

### C. THE JOKE WARS OF THE LATE TWENTIETH CENTURY

Joseph Boskin argues that the onset of the Reagan-Bush era marked the beginning of “joke wars” in which cycles of ethnic jokes significantly increased as a result of increasing racial tensions.<sup>52</sup> Jokes disparaging African-, Mexican-, and Jewish-Americans erupted onto the social scene.

#### 1. Jewish-American Princess Jokes

Jewish-American Princess jokes originated within the confines of the Jewish-American community as a form of self-depreciating humor that functioned to strengthen the solidarity of the Jewish community.<sup>53</sup> In the mid-1980s, however, the term was adopted outside the Jewish community, and the Jewish-American Princess jokes became increasingly anti-Semitic.<sup>54</sup> Jewish-American Princess jokes built on the image of the Jewish mother as an “overly protective, solicitous, anxious, demanding, and martyred parent.”<sup>55</sup> The Jewish daughter, the central figure of the Jewish-American Princess jokes, was portrayed as an extension of her mother: Spoiled and narcissistic, the Jewish-American Princess had a love for material things that took comic proportions.<sup>56</sup> The following are three examples of popular Jewish-American Princess jokes:

How does a [Jewish-American Princess] commit suicide? *She jumps off her shoe boxes.*

What is the new Jewish disease? *Maids. You die if you don't have one.*

How can you tell the widow at a Jewish funeral? *She's the one wearing the black tennis outfit.*<sup>57</sup>

Although the jokes mainly sparked outrage among the Jewish communities, the jokes were anti-feminist as well as anti-Semitic.

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51. *Id.* at 36.

52. REBELLIOUS LAUGHTER, *supra* note 7, at 119.

53. *Id.* at 120. This function of humor will be discussed further in Part III.B.

54. REBELLIOUS LAUGHTER, *supra* note 7, at 120.

55. *Id.*

56. *Id.*

57. *Id.*

## 2. African-American Jokes in the Post-Civil Rights Movement Era

After an initial reduction in African-American racial jokes following the civil rights movement, African-Americans again faced the brunt of American racial jokes during the late 1970s as a backlash against affirmative action spread across the country.<sup>58</sup> The long-lived commercialization of the “little black Sambo” image came to an end during the 1960s; however, black-face caricatures continued to appear in fraternity houses and business functions throughout the rest of the twentieth century.<sup>59</sup> Many jokes explicitly referenced slavery:

What did Lincoln say after a three-day drunk? *I freed the who?*

Other jokes defined African-Americans as stupid:

The Harlem High School cheer: Barbeque, watermelon, Cadillac car / We’re not as dumb as you think we is.

Why did the black man dress up for his vasectomy? Because if he was going to be impotent, he was going to look impotent.<sup>60</sup>

Another common theme connected blackness with violence:

How do you keep five black guys from raping a white woman? *Throw them a basketball.*

What do you get when you have one white and two blacks? *A victim.*<sup>61</sup>

The civil rights movement significantly reduced society’s tolerance for racial jokes in the public sphere, helped to promulgate adherence to politically sensitive speech, and greatly increased the upward mobility of African-Americans as a whole. Ironically, it also triggered the circulation of a new round of racial jokes that reflected the concern of white Americans over their own social status in the face of upwardly mobile African-Americans.

## 3. Mexican-American Jokes

Simultaneously, white anxiety regarding the influx of Mexican-American immigrants triggered a new breed of racial jokes. For example, jokes from this time period often featured both Mexican-Americans and African-Americans:

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58. *Id.* at 136.

59. *See id.*

60. *Id.* at 136–37.

61. *Id.* at 138.

A Puerto Rican [or a Mexican] and a black man jump from the top of the Empire States Building. Who lands first? *Who cares?* or *The black man—because the Puerto Rican [or Mexican] spray paints his way down.*<sup>62</sup>

Some jokes referenced Americans' concern over the influx of Mexican immigrants in the 1990s:

Why will there be no Mexicans in the next Olympics? Because anyone who can run, jump, or swim has left the country.<sup>63</sup>

Like many earlier joke cycles, these jokes reflected white concerns over maintaining the status quo and preserving national resources such as jobs and health care for white Americans.<sup>64</sup>

#### 4. White Anglo-Saxon Protestant Jokes

The proliferation of White Anglo-Saxon Protestant (“WASP”) jokes completed the cycle of the joke wars that swept the country during the closing decades of the twentieth century. Minorities fought back against the racial caricatures that had historically played a central role in American race relations by stereotyping upper-class white Americans as elitist, uptight, penurious, sexless Puritans whose detachment from the troubles of everyday life took comic proportions.<sup>65</sup> Popular examples included:

How many WASPs does it take to change a light bulb? Two—one to call the electrician, the other to make sure the martinis are chilled.

Why did God create WASPs? Because someone has to buy retail.<sup>66</sup>

In 1992, President George H.W. Bush added fuel to the fire while touring a grocery store when he stared in amazement at the grocery scanner on the checkout counter and asked for a demonstration of how it worked.<sup>67</sup> Compared to many other racial joke cycles, the WASP jokes were relatively short-lived, perhaps due in part to the social and political pressure brought to bear by the white majority.<sup>68</sup>

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62. *Id.* at 139 (alteration in original).

63. *Id.*

64. *See id.* at 139–41.

65. *Id.* at 147.

66. *Id.* at 147–48.

67. *Id.* at 147.

68. *Id.* at 149. One writer argued in *Yankee Magazine* that the term WASP was “a deep character insult that shouldn’t be permitted.” *Id.* Another complained in the *New York Times* that WASP had no “honest meaning” as “all Anglo-Saxon Protestants are white, so ‘WASP’ is redundant at best.” *Id.* Still others protested that whites no longer deserved this derision, as they no longer enjoyed a singularly privileged position above other racial groups. *Id.* *See also* Mark Munro, *Blue Bloods Say*

The WASP joke cycle is particularly interesting because it marks a significant change in American race relations. No longer do minority groups “grin and bear” oppressive racial jokes, but rather, they now fight back with aggressive humor of their own.

Ironically, these joke wars developed during the 1980s and 1990s, a time when many Americans considered racial turmoil largely subdued. If what makes people laugh is truly a good measure of what is on their minds,<sup>69</sup> however, then racial tensions swirled just beneath the surface of the American conscience. Given the central role that racial humor continues to play in American society, it is increasingly important that we determine whether jokes simply provide a momentary reprieve from our increasingly work-driven lives, or whether they are in fact capable of seriously influencing modern race relations.

### III. IT’S ONLY A JOKE: THE SERIOUS SIDE TO RACIAL HUMOR

Historical records indicate that joking has long been a part of human interaction. Plato, Aristotle, Cicero, and other early philosophers considered humor to be a dynamic communicatory tool that could channel either mirth and amusement or derision and contempt.<sup>70</sup> Jokes express innumerable messages ranging from conscious racism to nonsensical amusement. The analysis in Part III is restricted to the ability of humor to convey serious social messages, as the purpose of this Note is to examine whether humor functions to convey racism in modern America.

#### A. EARLY THEORIES OF MALICIOUS HUMOR

Given their fascination with the written and spoken word, it is not surprising that the Greeks and Romans were among the first philosophers to contemplate the complex role that humor plays in human relations. Plato believed that humor was a combination of joy and sadness that registered in the heart rather than the mind.<sup>71</sup> Aristotle believed that malice was essential to laughter and warned that jokes should be told with restraint due to their ability to inflict pain.<sup>72</sup> Cicero, the great Roman orator, warned that the use of wit in oration should be restrained due to the aggressive and

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*Term Is Unfair and Amounts to Brahmin-Bashing: Does ‘WASP’ Sting?*, BOSTON GLOBE, Nov. 15, 1990, at 101.

69. See DAVIES, *supra* note 4, at 9.

70. See ROBIN ANDREW HAIG, THE ANATOMY OF HUMOR: BIOPSYCHOSOCIAL AND THERAPEUTIC PERSPECTIVES 11–12 (Ralph Slovenko ed., 1988).

71. *Id.* at 12.

72. *Id.*

moral attributes of humor.<sup>73</sup> No strangers to the use of power, politics, and manipulation, the ancient Greeks and Romans understood that humor could be a powerful weapon that should be used with caution and deliberation.

In 1651, Hobbes developed one of the earliest and durational theories of humor: the superiority theory. He suggested that laughter resulted from the “sudden glory arising from some sudden conception of some eminency in ourselves; by comparison with the infirmity of others or with our own formerly.”<sup>74</sup> The crux of Hobbes’ theory holds that people use humor to attack the perceived infirmities of others, thereby reducing the status of the targeted group or individual.<sup>75</sup> Hobbes believed that social and power hierarchies could therefore be constructed through the use of hostile humor. Although he acknowledged that laughter could arise from considering “without offense . . . [the] absurdities and infirmities abstracted from persons,”<sup>76</sup> Hobbes, like Aristotle and Plato before him, considered constant laughter to be a validation of the self in comparison to others.<sup>77</sup>

Sigmund Freud suggested that jokes allow for the expression of hostile impulses that are usually not tolerated by society. He believed that the superego repressed personally and socially intolerable sentiments.<sup>78</sup> For Freud, jokes provided a medium through which people could express the hostility and aggression that are normally repressed by personal and social morals. In *Jokes and Their Relation to the Unconscious*, Freud stated that “[b]y making our enemy small, inferior, despicable or comic, we achieve in a roundabout way the enjoyment of overcoming him—to which the third person, who has made no efforts, bears witness by his laughter.”<sup>79</sup> When hostile messages are disguised in humor, the listener is “bribed” into agreement without closely scrutinizing the message conveyed by the joke.<sup>80</sup> Thus, according to Freud, humor allows for the innocuous release of

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73. *Id.*

74. *Id.* at 15.

75. See Chris Powell, *Humour as a Form of Social Control: A Deviance Approach*, in *IT’S A FUNNY THING, HUMOUR* 53, 54–55 (Antony J. Chapman & Hugh C. Foot eds., 1977).

76. JERRY PALMER, *TAKING HUMOUR SERIOUSLY* 94 (1994).

77. *Id.*

78. See CHRISTOPHER P. WILSON, *JOKES: FORM, CONTENT, USE AND FUNCTION* 94 (Henri Tajfel ed., 1979).

79. SIGMUND FREUD, *JOKES AND THEIR RELATION TO THE UNCONSCIOUS* 103 (James Strachey trans., 1963).

80. *Id.* Freud further explained, “A joke will allow us to exploit something ridiculous in our enemy which we could not, on account of obstacles in the way, bring forward openly or consciously; once again, then, the joke will evade restrictions and open sources of pleasure that have become inaccessible.” *Id.*

repressed hostile aggressions and affects a catharsis by smoothing the tensions caused by hostile sentiments and social inhibitions.<sup>81</sup>

#### B. DISPARAGEMENT HUMOR

A number of theorists have concluded that jokes often exploit the perceived infirmities of an enemy, thereby raising the status of the teller and the audience through disassociation.<sup>82</sup> For example, William H. Martineau concluded that when disparaging humor is focused on an out-group<sup>83</sup> it functions in two ways: (1) to solidify relations between the in-group,<sup>84</sup> and (2) to foster hostility toward the out-group.<sup>85</sup> Wolff, one of the earliest superiority theorists, concluded that in general people find humorous the failures and infirmities of those with whom they are unaffiliated due to a brief sensation of superiority.<sup>86</sup> In contrast, most find mirthless the disparagement of individuals to whom they are connected, as this failure is viewed as a reflection on the self.<sup>87</sup>

During World War II, Obrdlik found that Czechs living under Nazi occupation used humor to both encourage cohesion and target hostility toward the German invaders.<sup>88</sup> He further concluded that an oppressed person often used this “gallows humor”<sup>89</sup> to ridicule their oppressors and express resistance.<sup>90</sup> Wolff developed a reference group theory of humor that predicted that affiliations such as ethnic group and gender would greatly impact the appreciation of disparaging humor. He found that non-Jews appreciated jokes disparaging Jews much more than those that

81. Patricia Keith-Spiegel, *Early Conceptions of Humor: Varieties and Issues*, in *THE PSYCHOLOGY OF HUMOR* 3, 13 (Jeffrey H. Goldstein & Paul E. McGhee eds., 1972). Describing catharsis theories of humor, Keith-Spiegel concluded that “Freud could be characterized as the most eminent of the release theorists.” *Id.*

82. Jerry Suls, *Cognitive and Disparagement Theories of Humor: A Theoretical and Empirical Synthesis*, in *IT’S A FUNNY THING, HUMOUR*, *supra* note 75, at 42, 41–42. See HERBERT M. LEFCOURT, *HUMOR: THE PSYCHOLOGY OF LIVING BUOYANTLY* 64–65 (2001).

83. “Out-group” refers to the group of individuals who are not fully accepted and are therefore targeted for ridicule.

84. “In-group” refers to the group of individuals who are accepted.

85. William H. Martineau, *A Model of the Social Functions of Humor*, in *THE PSYCHOLOGY OF HUMOR*, *supra* note 81, at 101, 118–19. See LEFCOURT, *supra* note 82, at 138–39.

86. Dolf Zillmann, *Disparagement Humor*, in *1 HANDBOOK OF HUMOR RESEARCH* 85, 88 (Paul E. McGhee & Jeffrey H. Goldstein eds., 1983).

87. *Id.* at 85, 87.

88. Martineau, *supra* note 85, at 119.

89. “Gallows humor” is defined as humor utilizing irony or satire in hopeless or impossible situations for the purpose of gaining a measure of social control. HAIG, *supra* note 70, at 93.

90. *Id.*

ridiculed Jews themselves.<sup>91</sup> However, later scholars noted that Wolff's construction of disparaging humor did not account for the use of self-disparaging humor. Observing that many find self-disparaging jokes humorous, Zillmann concluded that the degree to which we enjoy the disparagement of others depends on one's positive or negative dispositional attitudes toward the subject at the moment the joke is told.<sup>92</sup> While dispositional attitudes may correspond with ethnicity or gender, they may also reflect a more transitory state of mind. For example, when temporarily annoyed at a close friend, an individual may find a joke disparaging that individual quite funny, while a few days later, after the annoyance has passed, the same joke might cause offense.<sup>93</sup>

### C. RACIAL HUMOR AND SOCIAL CONTROL

By definition, humor is thought to deal with unserious subjects and messages.<sup>94</sup> While this is often true, humor can also act as a vehicle for very serious social messages. Many societies have recognized the unique opportunities humor provides to exert social control through derision and ridicule. Obrdlik noted that the Eskimos used ridicule to sanction and deter thievery.<sup>95</sup> Rather than punishing an offender, a member of the community would simply laugh every time his or her name was mentioned, literally making the thief a village laughingstock.<sup>96</sup> For centuries, European countries locked criminals and social deviants in stocks where they were publicly ridiculed.<sup>97</sup> At times, Americans have also taken jokes seriously. In 1976, Secretary of Agriculture Earl Butz was forced to resign after telling an overtly racist joke.<sup>98</sup> Despite his protest that it was "just a joke," the public felt his true beliefs had been revealed and demanded his resignation.

Humor continues to have a profound impact on the construction of modern society by establishing scapegoats and conveying attitudes about

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91. Zillmann, *supra* note 86, at 88.

92. *Id.* at 90–91.

93. *See id.* at 91. Zillmann notes here that Hobbes' conclusion that people laugh at their "inferior former self" is consistent with the notion that when momentarily annoyed with themselves, they may be amused by a disparaging evaluation. *Id.*

94. *See* Joseph Boskin, *History and Humor*, in *THE HUMOR PRISM IN 20TH CENTURY AMERICA* 17, 20–22 (Joseph Boskin ed., 1997) [hereinafter *History and Humor*].

95. HAIG, *supra* note 70, at 92.

96. *Id.*

97. *Id.*

98. REBELLIOUS LAUGHTER, *supra* note 7, at 132–33.

religion, sexuality, and hierarchies.<sup>99</sup> Studies indicate that people consistently mock their “status, social, or power subordinates”:<sup>100</sup> whites ridicule African-Americans, doctors deride nurses and patients, and prison guards poke fun at inmates.<sup>101</sup> One explanation for the downward flow of racist humor in America is that whites have portrayed minorities as inept and inferior, thereby excusing America’s history of economic and social exploitation.<sup>102</sup> Exaggerating racial stereotypes in humor simultaneously reassures whites of their social dominance and communicates to minorities their place at the bottom of the American racial hierarchy. As Joseph Boskin and Joseph Dorinson explained, “[e]thnic humor in the United States originated as a function of social class feelings of superiority and white racial antagonisms, and expresses the continuing resistance of advantaged groups to unrestrained immigration and to emancipation’s black subcitizens barred from opportunities for participation and productivity.”<sup>103</sup> Oppressive racial humor operates to “emasculate, enfeeble, and turn victims into scapegoats.”<sup>104</sup> Historically, America’s predominantly white Protestant majority used disparaging humor to highlight the imagined stupidity, dirtiness, and moral and social inferiority of most minorities, ultimately constructing a racial hierarchy.

In contrast, Christie Davies argues that jokes neither have, nor are intended to have consequences; rather, they are a reflection of their social environment.<sup>105</sup> Even when they are not motivated by prejudice, Davies suggests ethnic jokes present a “social portrait” of which groups are accepted and which groups are outcasts by ascribing undesirable characteristics onto unaccepted groups.<sup>106</sup> Regardless of whether ethnic jokes operate as conduits for racial hierarchies or “thermometers” of their social environment,<sup>107</sup> ethnic jokes continue to play a consequential role in modern day relations.

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99. *See id.* at 175, 194, 215.

100. *Id.* at 215. *See* HAIG, *supra* note 70, at 93.

101. WILSON, *supra* note 78, at 215.

102. *See id.*

103. Boskin & Dorinson, *supra* note 31, at 97.

104. *Id.* at 100. It should be noted that there is significant evidence that the victims of disparaging humor often retell the jokes, thereby diffusing the intended insult and even attaching new empowering interpretations. Thus, ethnic humor can operate to support movement up the social ladder. *Id.* at 98.

105. DAVIES, *supra* note 4, at 9.

106. *See id.* at 9; PALMER *supra* note 76, at 62.

107. DAVIES, *supra* note 4, at 9.

## D. THE IMPACT OF RACIAL HUMOR ON TARGETED MINORITY GROUPS

Racism conveyed through humor continues to have a profound impact on American society. Without an understanding of the historical development and social function of racial jokes, those who have never experienced pervasive racial oppression cannot comprehend the devastating impact of hostile racial humor on targeted minorities. Although much has been written about racial jokes, a surprisingly small proportion considers their impact on ethnic minorities. Such analysis is particularly important in light of the increasing occurrences of racial harassment in American workplaces.<sup>108</sup> As one commentator recently observed, “[s]ocial hierarchy cannot and does not exist without being embodied in meanings and expressed in communications.”<sup>109</sup> Therefore, an analysis of ethnic humor is incomplete without an examination of the impact of racial jokes on those to whom they are directed.

In his article *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, Charles R. Lawrence III describes the varying reactions of Stanford University’s student body following a racial incident.<sup>110</sup> After arguing with a black student as to whether Beethoven was of African descent, two white students drew wild, curly black hair, big lips, and brown skin on a poster bearing Beethoven’s likeness.<sup>111</sup> The incident became known as the “Ujamaa incident” and sparked a campus-wide controversy that was divided along racial lines.<sup>112</sup> Many white students and faculty viewed the incident as an unfortunate, albeit mild example of racial incidents that have become increasingly common on American college campuses.<sup>113</sup> For many, however, the drawing conveyed an ominous message. The Sambo-like caricature mocked the notion that Beethoven’s genius could have sprung from African blood.<sup>114</sup> Furthermore, it built on the historical and cultural contexts of slavery, minstrel shows, and biological theories that defined African-Americans as intellectually inferior

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108. Kahan & Deem, *supra* note 14, at 1268.

109. CATHARINE A. MACKINNON, *ONLY WORDS* 13 (1993).

110. See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 53, 55 (Robert W. Gordon & Margaret Jane Radin eds., 1993).

111. *Id.* at 84.

112. See Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlé Williams Crenshaw, *Introduction*, in MATSUDA et al., *supra* note 110, at 53, 55.

113. *Id.*

114. *Id.*

to whites. To many African-American students, the drawing was no joke, and the racist message it delivered was quite serious.<sup>115</sup>

From its inception, American society has stereotyped ethnic minorities as racially inferior.<sup>116</sup> This tradition has endured despite the racial revolutions of emancipation and the civil rights movement. The repeated caricature of African-Americans and other minorities as dirty, stupid, lazy, and sexualized continues to enforce racial stigmatization. Psychological research indicates that at some level a racial hierarchy is “planted in our minds as an idea that may hold some truth” despite the resistance of both the victims and well-meaning dominant group members.<sup>117</sup> Erving Goffman argues that society views stigmatized individuals as not quite human and effectively reduces their life chances by exercising various forms of discrimination.<sup>118</sup>

The achievement of high socioeconomic status does not isolate minorities from the psychological harms of racial stigmatization.<sup>119</sup> Race, like physical disfigurement, cannot be altered. Feelings of self-doubt, humiliation, and self-hatred are common responses to stigmatization regardless of wealth or success.<sup>120</sup> Therefore, the Sambo-like Beethoven conveyed the same message to Stanford’s African-American students and janitors alike.

Studies demonstrate that children absorb notions of racial inferiority long before they attend school. The results of one study found that when given the choice between two dolls that were identical except that one had dark skin and one had light skin, African-American children preferred the light-skinned doll.<sup>121</sup> When asked why, the children responded that the dark-skinned doll looked “dirty” or “not nice.”<sup>122</sup> Despite their tender years, children understand the racist messages that jokes and stereotypes often promulgate. Furthermore, each generation of children that grows up

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115. *Id.*

116. See HUMOR AND SOCIAL CHANGE, *supra* note 3, at 28.

117. *Id.* at 25.

118. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963).

119. *Id.* at 91.

120. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, in MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 89, 91 (Robert W. Gordon & Margaret Jane Radin eds., 1993). Psychologist Kenneth Clark explains “[h]uman beings . . . whose daily experience tells them that almost nowhere in society are they respected and granted the ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own worth.” *Id.* (alterations in original).

121. *Id.* at 93.

122. *Id.*

learning that black skin is dirty and white skin is clean<sup>123</sup> will unconsciously perceive American society as racially stratified.

#### E. JOKES IN THE AMERICAN WORKPLACE

As in many other areas of modern life, individuals frequently utilize humor to control and cope with the unique social tensions created in the workplace. Not surprisingly, the results of studies examining humor and joking at work parallel the results of studies conducted outside of the workplace. Many new employees find themselves facing the brunt of their coworkers' jokes until they have gained acceptance in the workplace community.<sup>124</sup> Jokes can function as a shortcut to consensus building or aggressively define a power structure.<sup>125</sup> In the innately competitive American workplace, humor facilely establishes a pecking order, identifying who is accepted and ostracizing those who are not. Since the 1980s, American courts have attempted to designate when humor in the workplace constitutes harassment.<sup>126</sup> In the years since, some courts have begun to acknowledge that such determinations must consider context, workplace, and social culture; however, many others continue to examine racial harassment claims based on ethnic joking within the sterile vacuum of the courtroom, without contemplating the role humor has historically played in shaping American society.

### IV. RACIAL JOKES AS HARASSMENT: A MATTER OF PERSPECTIVE

#### A. THE CIVIL RIGHTS ACT OF 1964

Racial harassment claims are a subset of racial discrimination claims.<sup>127</sup> As amended by the Civil Rights Act of 1991, Title VII of the Civil Rights Act of 1964 requires employers to treat their employees equally "with respect to . . . compensation, terms, conditions, or privileges

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123. *Id.*

124. See George E.C. Paton & Ivan L. Filby, *Humour at Work and the Work of Humour*, in *THE SOCIAL FACES OF HUMOUR: PRACTICES AND ISSUES* 105, 108 (George E.C. Paton et al. eds., 1996).

125. See *id.* at 122. In this context, humor in the workplace functions to define a social and racial hierarchy within the workplace. As Christie Davies has argued, jokes reflect the social attitudes of the people who tell them. Thus, jokes often reveal which groups or individuals are socially accepted and which reside on the periphery. See DAVIES, *supra* note 4, at 9.

126. See Paton & Filby, *supra* note 124, at 109; discussion *infra* Part IV.

127. See Kahan & Deem, *supra* note 14, at 1234.

of employment” based on race, color, religion, sex, or national origin.<sup>128</sup> Enacted in the midst of the civil rights movement, Congress intended Title VII to strike at the pervasive racial inequalities that permeated virtually every sphere of American public and private life.<sup>129</sup> Although Title VII does not explicitly define or even mention “harassment” or “hostile work environment,” the courts recognize two types of impermissible employment actions: (1) overtly discriminatory employment practices typically characterized by a firing or refusal to hire individuals belonging to a protected class, and (2) intangible discrimination such as racial or sexual harassment that alters the terms or conditions of the employment by creating a hostile or abusive work environment.<sup>130</sup>

Racial harassment claims may also be brought under 42 U.S.C. § 1981.<sup>131</sup> Section 1981 provides that all citizens of the United States shall enjoy the same right to “make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all law and proceedings for the security and property as is enjoyed by white citizens.”<sup>132</sup> Unlike the main body of Title VII, § 1981 is specifically tailored to combat racial discrimination.<sup>133</sup> Consequently, sexual harassment claims cannot be brought under § 1981. Although the same principles governing Title VII claims are applied to racial claims filed under § 1981, there is one significant difference. While Title VII merely requires that an employment relationship exist to bring a claim of racial harassment, some jurisdictions

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128. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (2001)).

129. Marks, *supra* note 13, at 1407–08. See also *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (discussing Congress’ intent); Rebecca Brannan, Note, *When the Pig Is in the Bamyard, Not the Parlor: Should Courts Apply a “Coarseness Factor” in Analyzing Blue-Collar Hostile Work Environment Claims?*, 17 GA. ST. U. L. REV. 789, 791–92 (2001).

130. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753–54 (1998) (defining tangible employment action as constituting a change in the terms and conditions of employment); *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998) (defining discriminatory employment actions with tangible results as hiring, firing, promotion, compensation, and work assignment). See also Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Work Environment Cases*, 34 WAKE FOREST L. REV. 71, 75–86 (1999); Frank, *supra* note 14, at 442–43; Kahan & Deem, *supra* note 14, at 1252–53.

131. Kahan & Deem, *supra* note 14, at 1235.

132. 42 U.S.C. § 1981(a) (2001).

133. The plain language of the statute states that “(a)ll persons . . . shall have the same right in every State and Territory to make and enforce contracts. . . as is enjoyed by white citizens . . .” 42 U.S.C. § 1981. Therefore, it is clear that Congress specifically tailored the statute to address racial discrimination claims.

have interpreted § 1981 to require a contractual relationship between employer and employee.<sup>134</sup>

#### B. HOSTILE WORK ENVIRONMENT RACIAL HARASSMENT

To present a *prima facie* case of racial harassment, a plaintiff must prove he or she suffered racial harassment sufficiently severe and pervasive to create an objectively hostile working environment that altered the terms or conditions of the plaintiff's employment.<sup>135</sup> Unlike sexual harassment, there is no statutory, regulatory, or judicial definition of what constitutes a racially hostile work environment.<sup>136</sup> However, EEOC regulations defining sexual harassment indicate that the principles of sexual hostile work environment claims also "apply to race, color, religion, or national origin."<sup>137</sup> Since 1986, the U.S. Supreme Court has ruled on five cases involving hostile work environment claims, and all involved claims of sexual harassment.<sup>138</sup> Consequently, the principles governing hostile work

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134. Kahan & Deem, *supra* note 14, at 1283. *See, e.g.*, Perry v. Woodward, 188 F.3d 1220, 1227 (10th Cir. 1999) (allowing an at-will employee to bring suit under § 1981). *But see* Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1034–35 (7th Cir. 1998) (declining to consider whether an at-will employee may bring claim under § 1981, but instead granting summary judgment on other grounds). Many plaintiffs find § 1981 more appealing because Congress has not imposed a statutory cap on punitive damages. Under both Title VII and § 1981, when malice or reckless indifference to individual rights procured by federal law is demonstrated, punitive damages may be awarded. *See* 42 U.S.C. § 1981a(a)(1), (b)(1).

135. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 58, 68 (1986). *See also* ROSSEIN, *supra* note 14, § 6.7, at 6-37; Beiner, *supra* note 130, at 76–77; Frank, *supra* note 14, at 445–46; Kahan & Deem, *supra* note 14, at 1240.

136. Kahan & Deem, *supra* note 14, at 1268. *See also* Moore v. KUKA Welding Sys. Corp., 171 F.3d 1073, 1079 (6th Cir. 1999); Baskerville v. Culligan Int'l Co., 50 F.3d 428, 428–29 (7th Cir. 1995).

137. Kahan & Deem, *supra* note 14, at 1268 (citing 29 C.F.R. § 1603.11 n.1 (1999)).

138. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (holding, along with *Burlington Industries*, that employers are vicariously liable for supervisory harassment and establishing a defense for intangible adverse employment action cases if the employer demonstrates it had established reasonable procedures to prevent and correct harassing conduct that the employee did not utilize); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (holding that the objective severity of harassment should be evaluated by the reasonable person standard while considering "all of the circumstances" and the "social context" in which the alleged harassing conduct occurred); *Harris*, 510 U.S. at 21, 23 (reaffirming that Title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment and designating relevant factors that might indicate the existence of a hostile work environment); *Meritor Sav. Bank*, 477 U.S. at 58, 65 (holding that an employee had a valid claim of sexual harassment on the basis of hostile work environment if her supervisor's sexual attentions were unwelcome).

environment claims based on sexual harassment are also controlling for racial harassment.<sup>139</sup>

The U.S. Court of Appeals for the Fifth Circuit first recognized hostile work environment claims in *Rogers v. EEOC*, a case involving a claim of racial harassment.<sup>140</sup> The plaintiff, a Spanish-American, claimed she had been tormented by the seven Caucasian nurses with whom she worked and was wrongfully terminated because of her race.<sup>141</sup> In *Rogers*, Justice Goldberg observed, “Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliations of ethnic discrimination.”<sup>142</sup> He went on to say “[t]hat employees’ psychological as well as economic fringes are statutorily entitled to protection from employer abuse” and found that § 703 of Title VII “is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.”<sup>143</sup>

Fifteen years later, in 1986, the U.S. Supreme Court considered its first case involving hostile work environment.<sup>144</sup> The facts of *Meritor Savings Bank, FSB v. Vinson* were particularly egregious.<sup>145</sup> The plaintiff, Michelle Vinson, claimed that during the four years she had worked at Meritor Savings, her supervisor “fondled her in front of other employees, followed her into the women’s restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions.”<sup>146</sup> Afraid that she would lose her job if she did not comply, Vinson testified that she had sexual relations with her supervisor between forty and fifty times.<sup>147</sup>

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139. Kahan & Deem, *supra* note 14, at 1268. See also *Faragher*, 524 U.S. at 787 n.1 (“Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.”).

140. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). See also *Meritor Sav. Bank*, 477 U.S. at 65 (noting that *Rogers* was the first case to recognize a cause of action based on a discriminatory work environment).

141. *Rogers*, 454 F.2d at 236.

142. *Id.* at 238.

143. *Id.*

144. Hostile work environment claims share the same analytical framework regardless of whether they are based on racial or sexual harassment.

145. See *Meritor Sav. Bank*, 477 U.S. at 59–61.

146. *Id.* at 60.

147. *Id.*

In holding that a claim of hostile work environment is actionable under Title VII, the U.S. Supreme Court adopted the Fifth Circuit's position that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."<sup>148</sup> As not all workplace conduct may be described as harassment, a plaintiff must establish that the alleged conduct was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"<sup>149</sup>

Although *Meritor Savings* specifically addressed a sexual harassment claim, it also applies to hostile work environment claims based on racial harassment.<sup>150</sup> There is one significant difference between hostile work environment claims based on race and those based on sex: Defendants have yet to argue successfully that race-based harassment was welcome.<sup>151</sup> In general, a plaintiff need only establish the harassment was race-based. Thus, in hostile work environment claims based on racial harassment, the following requirements are generally sufficient to establish a prima facie case: (1) an employment relationship (Title VII) or a contractual relationship (§ 1981) existed; (2) the plaintiff was subjected to derogatory or hostile comments, jokes, or acts of a racial nature; (3) the conduct had the purpose or effect of interfering with the plaintiff's work performance or creating an intimidating, hostile, or abusive work environment; and (4) the employer knew or should have known about the alleged harassing conduct and failed to take prompt and effective remedial action.<sup>152</sup>

In 1993, the U.S. Supreme Court again granted certiorari to a case involving sexual harassment to resolve a split in the circuits regarding whether harassing conduct must be so severe as to affect the plaintiff's psychological well-being to establish a hostile work environment.<sup>153</sup> In *Harris v. Forklift Systems*, the plaintiff, Teresa Harris, alleged that the company president often insulted her because of her gender and made her

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148. *Id.* at 64 (quoting *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

149. *Id.* at 68 (alterations in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

150. See *Jackson v. Quanex Corp.*, 191 F.3d 647, 658 (6th Cir. 1999); ROSSEIN, *supra* note 14, § 6.7, at 6-37 to 6-41 (discussing *Meritor Savings*); Kahan & Deem, *supra* note 14, at 1268-69.

151. Cf. Kahan & Deem, *supra* note 14, at 1240 (discussing how courts determine whether sexual conduct was "welcome" in sexual harassment suits).

152. See ROSSEIN, *supra* note 14, § 6.7[1], at 6-42; Kahan & Deem, *supra* note 14, at 1240-41.

153. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993).

the target of sexual innuendoes.<sup>154</sup> The district court rejected Harris' hostile work environment claim after finding that although the president's comments offended Harris and would have offended a reasonable woman, offensive comments do not create a hostile work environment unless they are "so severe as to be expected to seriously affect [Harris'] psychological well-being."<sup>155</sup> The Court of Appeals for the Sixth Circuit affirmed.<sup>156</sup> The U.S. Supreme Court, however, overturned the ruling of the lower courts, finding that evidence of psychological injury is not necessary to prove a hostile work environment claim. Acknowledging that early discrimination claims had been based on economic or tangible discrimination, the Court reiterated its holding in *Meritor Savings* that intimidation, insults, and ridicule could be sufficient to support a claim of hostile work environment if the alleged conduct was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."<sup>157</sup>

Assessing whether allegedly harassing conduct is severe or pervasive enough to create a hostile or abusive working environment is factually intensive.<sup>158</sup> In an attempt to provide some guidance as to when the lower courts should impose liability, the Court created a severe or pervasive test that called for a flexible case-by-case analysis of allegedly harassing behavior while requiring some showing of severe or pervasive harassment.<sup>159</sup> This test was intended to take a "middle path" between imposing liability for the mere utterance of an isolated offensive comment and requiring a plaintiff to suffer a nervous breakdown to demonstrate an actionable claim.<sup>160</sup> The Court designated five nonexclusive factors as possible signals of a hostile work environment: (1) the frequency of the discriminatory conduct; (2) the severity of the conduct; (3) whether it was physically threatening, humiliating, or a merely offensive utterance; (4) whether it unreasonably interfered with an employee's performance;

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154. *Id.* at 19.

155. *Id.* at 20 (alterations in original). *See also* ROSSEIN, *supra* note 14, § 6.7, at 6-39; Beiner, *supra* note 130, at 79-81; Frank, *supra* note 14, at 446-48; Brannan, *supra* note 129, at 814-17.

156. *Harris*, 510 U.S. at 20.

157. *Id.* at 21.

158. ROSSEIN, *supra* note 14, § 6.7[3], at 6-64. *See also* Beiner, *supra* note 130, at 75-86; Frank, *supra* note 14, at 445-48; Kahan & Deem, *supra* note 14, at 1248-52 (stating that the central issue concerns the nature of the conduct and whether it is sufficiently pervasive and severe); Marks, *supra* note 13, at 1408-12.

159. *Harris*, 510 U.S. at 22-23. *See also* Beiner, *supra* note 130, at 79-81; Frank, *supra* note 14, at 445-48; Kahan & Deem, *supra* note 14, at 1244-46, 1248-52; Marks, *supra* note 13, at 1408-12.

160. *Harris*, 510 U.S. at 21.

and (5) whether it caused psychological harm.<sup>161</sup> The Court strongly emphasized, however, that these factors were merely exemplary and that no single factor was required.<sup>162</sup>

*Harris* also requires a plaintiff to prove that harassment was severe and pervasive enough to create both a subjectively and an objectively hostile work environment.<sup>163</sup> Thus, the plaintiff must convince a judge or jury that a reasonable person would have found the work environment to be hostile.<sup>164</sup> In addition, the plaintiff must have subjectively perceived the alleged conduct to have altered the terms and conditions of his or her employment.<sup>165</sup> Finally, the Court instructed the lower courts to look to the circumstances surrounding the abusive behavior when determining whether a work environment is hostile or abusive.<sup>166</sup>

In his concurring opinion, Justice Scalia warned that the Court's abusive or hostile standard was inherently and intentionally vague so as to encompass the amorphous fact patterns of hostile work environment claims. Observing that the recognition of the nonexclusive factors lent little certitude to what constitutes a legally cognizable hostile work environment,<sup>167</sup> Justice Scalia reluctantly admitted he could find no better alternative and ultimately concluded that the adopted severe and pervasive test was ultimately "faithful to the inherently vague statutory language."<sup>168</sup>

Five years later, the U.S. Supreme Court considered a trilogy of hostile work environment cases based on sexual harassment. In *Oncale v. Sundowner Offshore Services, Inc.*,<sup>169</sup> the plaintiff had worked for Sundowner Offshore Services as part of an eight-person crew on an oil platform in the Gulf of Mexico. During his employment, Oncale was forcibly subjected to several humiliating sex-related acts in the presence of his coworkers. Writing for the Court, Justice Scalia interpreted Title VII to prohibit same-sex sexual harassment. He then reiterated that "the objective

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161. *Id.* at 23. See also Frank, *supra* note 14, at 447–48; Kahan & Deem, *supra* note 14, at 1248.

162. See *Harris*, 510 U.S. at 22 (explaining that the severe and pervasive test "is not, and by its nature cannot be, a mathematically precise test").

163. See *id.* at 21.

164. See *id.*

165. See *id.*

166. *Id.* at 23. See Frank, *supra* note 14, at 446. The "totality of the circumstances" standard can be interpreted in three different ways: (1) the fact-finder must look at the context in which the discrimination took place; (2) the fact finder must employ big-picture analysis evaluating all the harassing incidents as a collective whole; or (3) both. See Beiner, *supra* note 130, at 81.

167. See *Harris*, 510 U.S. at 24 (Scalia, J., concurring). See also Marks, *supra* note 13, at 1411 (discussing Justice Scalia's concurring opinion in *Harris*).

168. *Harris*, 510 U.S. at 25.

169. 523 U.S. 75, 77 (1998).

severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'<sup>170</sup> Scalia also reemphasized that determination of the objective severity of harassment "requires careful consideration of the social context in which particular behavior occurs and is experienced. . . ."<sup>171</sup> The Court provided an explicit and now famous example: "A professional football player's working environment is not severely or pervasively abusive . . . if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office."<sup>172</sup> Thus, the real impact of workplace behavior often depends on the surrounding circumstances, expectations, and relationships that might not be revealed by a recitation of the words said or actions performed.<sup>173</sup> Common sense and sensitivity to social context, Scalia proclaimed, will assist a court or jury to distinguish between innocent teasing and severe or abusive harassment.<sup>174</sup>

The second and third cases of the 1998 sexual harassment trilogy were issued on the same day, addressing the issue of whether employers may be held liable for supervisory harassment.<sup>175</sup> *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* established two types of harassment cases: (1) cases of supervisory harassment in which there is some tangible employment action; and (2) cases of supervisory harassment that do not culminate in tangible employment action but do create a hostile work environment.<sup>176</sup> In cases of intangible discrimination:

[A] defending employer may raise an affirmative defense to liability or damages subject to preponderance of the evidence. The defense comprises two necessary elements: (a) the employer exercised reasonable care to prevent and correct promptly, any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>177</sup>

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170. *Id.*

171. *Id.* at 81.

172. *Id.*

173. *See id.* at 82.

174. *Id.*

175. *See Marks, supra* note 13, at 1415.

176. *Id.* *See Kahan & Deem, supra* note 14, at 1252–53 (stating that "tangible employment actions" are necessary in both quid pro quo and hostile work environment cases).

177. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). *See also Beiner, supra* note 130, at 84; *Kahan & Deem, supra* note 14, at 1265–66; *Marks, supra* note 13, at 1419–21.

Despite the U.S. Supreme Court's recent attention to hostile work environment analysis, many questions remain as to what the Court intended when it directed the lower courts to contextualize hostile work environment analysis within the social framework.<sup>178</sup> Confusion as to how to interpret the "social context" instruction of *Oncale* has led to chaos in the lower courts, leading some courts and commentators to observe that what constitutes a hostile work environment is largely a matter of perspective.<sup>179</sup>

### C. NO LAUGHING MATTER: RACIAL JOKES, DISCRIMINATION, AND THE WORKPLACE

In October 2001, the U.S. Court of Appeals for the Ninth Circuit upheld one of the largest verdicts for racial harassment based solely on offensive language<sup>180</sup> and reaffirmed that racial jokes in the workplace can by themselves constitute actionable discrimination. In *Swinton v. Potomac Corp.*, the plaintiff, Troy Swinton, was the only African-American among 140 employees working for Potomac Corporations, a subsidiary of U.S. Mat that produces cardboard thirty miles outside of Seattle.<sup>181</sup> Almost daily, Swinton's supervisor, Jon Fosdick, would stop by the shipping department and tell a stream of racial jokes in front of Swinton and his coworkers. The following are a few examples of the racial jokes quoted from the trial transcript:

Why don't black people like aspirin? *Because they're white, and they work.*<sup>182</sup>

What do you call a transparent man in a ditch? *A nigger with the shit kicked out of him.*<sup>183</sup>

Did you ever see a black man on "The Jetsons"? *Isn't it beautiful what the future looks like?*<sup>184</sup>

At trial, Swinton testified that Fosdick told jokes "whenever he felt like it, all the time."<sup>185</sup> Pat Stewart, Swinton's immediate supervisor, did not personally tell racial jokes; however, Swinton testified that Stewart often overheard those told by Fosdick and laughed along.<sup>186</sup> At trial,

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178. See Frank, *supra* note 14, at 451. See also ROSSEIN, *supra* note 14, § 6.7[3], at 6-65.

179. See Frank, *supra* note 14, at 494.

180. Weinstein, *supra* note 9.

181. 270 F.3d 794, 799 (9th Cir. 2001).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

Stewart acknowledged using racial slurs two or three times, but it is unclear from his testimony whether Swinton was present at those times.<sup>187</sup> Stewart also testified that he had often heard one of the company's two plant managers tell racial jokes.<sup>188</sup> Although company policy required that Stewart report and address racial harassment, he did nothing to curtail the telling of racial jokes on the factory floor. Potomac employees testified at trial that racial jokes targeting a wide variety of ethnic groups, including whites, Asians, Poles, Jews, and Hispanics, were common at Potomac.<sup>189</sup>

Swinton also testified that Fosdick began telling racial jokes soon after Swinton began work at Potomac. Despite his anger and humiliation, he testified that he did not immediately quit because he needed the job to support himself and his fiancée.<sup>190</sup> After seven months on the job, he explained that he could no longer endure the daily harassment and quit on February 27, 1997.<sup>191</sup> On an application for unemployment benefits, Swinton stated that he had left his place of employment because of "racial slander" and "racial jokes [told] daily by numerous people."<sup>192</sup>

The State of Washington notified Potomac of Swinton's allegations of harassment on April 17, 1999.<sup>193</sup> In response, Vicki Thompson, the U.S. Mat director of human resources, interviewed Stewart, Potomac's coplant managers, and Potomac's president.<sup>194</sup> All denied having witnessed Swinton being harassed.<sup>195</sup> In July 1997, Swinton filed suit against Potomac under 42 U.S.C. § 1981 of the Civil Rights Act of 1964, R.C.W. 49.60 (the "Washington Law Against Discrimination"), and the Washington state tort of "outrage" (intentional infliction of emotional distress).<sup>196</sup> Following notification that Swinton had filed suit, Thompson interviewed more of Potomac's employees, who confirmed that Fosdick had told racial jokes in Swinton's presence, but stated that they believed Swinton had not been bothered by the jokes.<sup>197</sup> In September 1997, U.S. Mat required all of its supervisors and managers to undergo training in

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187. *Id.*

188. *Id.*

189. *Id.*

190. *See id.* at 800.

191. *See id.*

192. *Id.* at 801.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

identifying and responding to harassment.<sup>198</sup> No one at Potomac was ever reprimanded for engaging in or tolerating racially offensive language.<sup>199</sup>

In pretrial motions, the district court granted Potomac's motion for summary judgment on Swinton's tort claim of "outrage," but denied its motion for summary judgment on the discrimination claims.<sup>200</sup> The case was tried before U.S. District Court Judge Jack Tanner.<sup>201</sup> At trial, Swinton admitted that he had not filed a formal complaint, despite the fact that Potomac's employees' manual instructed him to notify either his supervisor or the president of the company, because he feared retaliation.<sup>202</sup> Swinton also explained that he thought filing a complaint with Stewart, as the employee manual instructed him to do, would be futile, as Stewart had often overheard the racial jokes told at Potomac and often laughed at them.<sup>203</sup> Swinton did not know the identity of the president of the company, and because of this, he did not bring a complaint to his attention.<sup>204</sup>

Potomac attempted to assert the *Ellerth/Faragher* defense, claiming that Stewart, although a supervisor, was not part of Potomac's management, and therefore his knowledge of the racial jokes and subsequent inaction could not be imputed to the company.<sup>205</sup> Potomac also argued on appeal that a hostile work environment did not exist because both African-Americans and whites were the subject of racial jokes in its workplace.<sup>206</sup> The jury returned a verdict in Swinton's favor and awarded \$1,000,000 in punitive damages,<sup>207</sup> one of the largest verdicts ever awarded in a racial harassment case based solely on offensive language.<sup>208</sup> Potomac subsequently moved for a new trial under the Federal Rules of Civil Procedure 50(b) and 59.<sup>209</sup> The trial court denied the motion, ruling that to do so "merely rehashes arguments that it made and lost during trial."<sup>210</sup>

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198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *See id.* at 800-01.

203. *Id.* at 801.

204. *Id.*

205. *See id.* at 804.

206. *Id.* at 807.

207. *Id.* at 799.

208. Weinstein, *supra* note 9.

209. *Swinton*, 270 F.3d at 801-02.

210. *Id.* at 802.

Potomac next appealed the jury's verdict to the Court of Appeals for the Ninth Circuit.<sup>211</sup>

When announcing its decision to uphold the jury's verdict, the court of appeals proclaimed "[t]his case should serve as a reminder to employers of their obligation to keep their workplaces free of discriminatory harassment."<sup>212</sup> It went on to state that "overwhelming evidence"<sup>213</sup> confirmed that Swinton was subjected daily to racial harassment that no one at Potomac attempted to curtail, even after the jokes were brought to management's attention.<sup>214</sup> Further, the court explicitly rejected Potomac's argument that its work environment was not racially hostile because both whites and African-Americans endured racial ridicule, holding that the company could not escape liability because it was "an equal opportunity harasser."<sup>215</sup> Finally, the court flatly rejected Potomac's argument on appeal that Judge Tanner had demonstrated personal bias in favor of the plaintiff when questioning one of the plant managers.<sup>216</sup> The court stated that Judge Tanner's questions "reveal[ed] little of consequence."<sup>217</sup> Affirming both the liability determination and the punitive damages, the court concluded that "[a]lthough much of what happened here was characterized as 'jokes,' neither the discrimination nor the jury verdict is a laughing matter."<sup>218</sup>

In many respects, *Swinton v. Potomac Corp.* is a very significant case. First, the case is symbolically important because the jury expressly rejected Potomac's classic defense that while its employees' behavior constituted "tasteless, objectively offensive joking," the conduct Swinton claimed was harassment was considered "nothing more than 'joking.'"<sup>219</sup> With a million dollar verdict, the *Swinton* jury reinforced that racial discrimination is not permissible when couched in humor and significantly curtailed the judicial leeway courts have sometimes allowed for horseplay in the workplace.<sup>220</sup>

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211. *Id.*

212. *Id.* at 799.

213. *See id.* at 806.

214. *See id.* at 818.

215. *Id.* at 807.

216. *See id.* at 808.

217. *Id.*

218. *Id.* at 799.

219. *See id.* at 817.

220. *See, e.g.,* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir. 1995) (proclaiming that a less rigorous standard of liability would attempt to protect women from everyday insults "as if they remained models of Victorian reticence"); Swentek v. USAIR, Inc., 830 F.2d 552, 562 (4th Cir. 1987) ("The workplace is not a Victorian parlor, and the courts are not the arbiters of its

Second, neither of the supervisors involved ranked higher than middle management. Jon Fosdick,<sup>221</sup> who acted as a supervisor in another division of the company, told most of the racial jokes.<sup>222</sup> Swinton's immediate supervisor, Pat Stewart, did not tell racial jokes himself, but he often overheard them and even laughed along.<sup>223</sup> Although Potomac argued that Stewart did not qualify as management, the court found that he had management responsibilities despite his relatively low rank within the company hierarchy, reasoning that Potomac's employee manual dictated that Stewart receive and respond to complaints of harassment on Potomac's behalf.<sup>224</sup>

Third, the court of appeals upheld liability despite the fact that Swinton had not made a formal complaint regarding the racial jokes.<sup>225</sup> Rejecting Potomac's objections that Swinton had not utilized the company's existing policy for reporting racial harassment, the court held that overwhelming evidence supported Swinton's claims that either (1) Potomac knew or should have known that racial harassment was regularly occurring in its plants due to the severity of the conduct, and it failed to take action; or (2) that Potomac knew, though complaints or circumstances, that racial harassment was occurring and failed to take action to stop it.<sup>226</sup>

Fourth, *Swinton* is particularly significant because the plaintiff's racial harassment claim was based solely on the telling of racial jokes in the workplace. While a number of cases have recognized that racial jokes can function as racial discrimination,<sup>227</sup> *Swinton v. Potomac Corp.* is one of the

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etiquette."); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924, 926 (5th Cir. 1982) (characterizing a work environment in which the plaintiff's coworkers covered the plaintiff's genitals in grease, poured hot coffee into his back pocket, and referred to him as "nigger," "coon," and "black boy," as "coarse, rowdy, and generally abusive" but not racially discriminatory because the plaintiff was not singled out because of race). *But see Williams v. Gen. Motors Corp.*, 187 F.3d 553, 564 (6th Cir. 1999) (stating that women who work in a male-oriented environment do not deserve less protection); *Jackson v. Quanex Corp.*, 191 F.3d 647, 662 (6th Cir. 1999).

221. The fact that Jon Fosdick is the uncle of Troy Swinton's fiancée is an interesting twist that nonetheless had little bearing on the court's decision or the case's precedent. *See Swinton*, 270 F.3d at 799.

222. *See id.*

223. *See id.* (noting that Stewart acknowledged making racial jokes two or three times, although it was not clear whether the jokes were made in Swinton's presence).

224. *See id.* at 805 (finding that Stewart had "an official or strong de facto duty to act as a conduit to management for complaints about work conditions").

225. *See id.* at 801; Weinstein, *supra* note 9.

226. *See Swinton*, 270 F.3d at 804.

227. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1251, 1256-57 (10th Cir. 2001) (finding that the regular telling of racial jokes by the company's vice president responsible for hiring, coupled with the retaliatory reduction of hours and

few decisions to impose liability for racial jokes alone.<sup>228</sup> The jury verdict, one of the largest awards for a racial harassment case based solely on offensive language, unquestionably demonstrates that racial jokes in the workplace can create a severe and pervasive hostile work environment.<sup>229</sup>

#### D. RACIAL JOKES, SOCIAL CONTEXT, AND THE REASONABLE PERSON

The million dollar verdict in *Swinton v. Potomoc Corp.* garnered considerable legal and media attention<sup>230</sup> and refocused national attention on discrimination claims based on hostile work environments.<sup>231</sup> It has also sharply reminded employers to keep their workplaces free of racial jokes and harassment. However, given the inevitably amorphous fact patterns of hostile work environment claims, the standard for determining what comprises severe or pervasive harassment remains inherently and intentionally vague.<sup>232</sup> As predicted, the circuit courts' interpretations of what constitutes a hostile work environment have varied substantially. Nearly identical behavior may be considered in some circuits to be objectively severe or pervasive harassment while merely offensive in others.<sup>233</sup> Thus, *Swinton* ultimately represents just one interpretation of hostile work environments among a myriad of varying circuit court decisions.<sup>234</sup>

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termination, was sufficient for a hostile work environment claim); *Moore v. KUKA Welding Sys.*, 171 F.3d 1073, 1076–78 (6th Cir. 1999) (upholding liability when undisputed evidence proved the plaintiff suffered a barrage of racial jokes on the job and was isolated from coworkers after filing suit with the EEOC); *Jackson v. Quanex Corp.*, 191 F.3d 647, 660 (6th Cir. 1999) (overturning the district court's exclusion of overwhelming evidence of discriminatory conduct, including racial jokes, graffiti, and tampering with the plaintiff's work environment); *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 356–57 (8th Cir. 1997) (finding that a steady onslaught of racial jokes and slurs was sufficiently severe and pervasive to create a hostile work environment).

228. Weinstein, *supra* note 9.

229. *See id.*

230. *See supra* note 12. *See, e.g.*, Weinstein, *supra* note 9.

231. *See supra* Part IV.C.

232. *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (“[C]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.”); *Harris*, 510 U.S. at 24–25 (Scalia, J., concurring) (noting that the majority opinion adds “little certitude” to deciding sexual harassment claims).

233. *See ROSSEIN, supra* note 14, § 6.7[3], at 6-66; Frank, *supra* note 14, at 494.

234. *See ROSSEIN, supra* note 14, § 6.7[3], at 6-65 to 6-66; Frank, *supra* note 14, at 494; Kahan & Deem, *supra* note 14, at 1271–76 (reviewing circuit cases concerning hostile work environment cases regarding racial harassment).

A number of commentators have noted that identifying a hostile work environment has increasingly become a matter of perception.<sup>235</sup> Richard Winter, one of the attorneys representing Potomac, underscored this sentiment following the court of appeals' affirmation of the jury's verdict when he said it was "difficult to try the case" before U.S. District Court Judge Jack Tanner, an eighty-year-old African-American. Winter commented that Judge Tanner "was visibly distressed by the evidence of the 'N-word.'"<sup>236</sup> Although the court of appeals ruled that nothing in the trial transcript supported Potomac's claim of bias,<sup>237</sup> Winter's protest echoes the concern of many legal commentators and judicial decision-makers that whether a workplace will be found to be hostile or abusive is primarily a matter of perspective. The amorphous nature of objective severity of harassment determinations and the confusion regarding the extent that "social context"<sup>238</sup> should be considered when evaluating hostile work environment claims has resulted in chaos among the circuit courts.<sup>239</sup> This confusion is compounded in hostile work environment claims based on racial harassment by the lack of a statutory or regulatory definition of what constitutes racial harassment and the fact that the U.S. Supreme Court has never considered a hostile work environment

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235. See ROSSEIN, *supra* note 14, § 6.7[3] (noting the outcomes of numerous circuit court decisions based on racial harassment); Frank, *supra* note 14, at 494-95. In the context of sexual harassment claims, many courts and scholars have begun to question whether a motion for summary judgment is an appropriate forum for analyzing whether allegedly harassing conduct is sufficiently severe or pervasive, since it is a particularly fact-intensive determination. See, e.g., Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998) (finding that "[w]hatever the early life of a federal judge, she or he usually lives in a narrow segment of the . . . American socioeconomic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace"); Matute v. Hyatt Corp., No. 98 CIV. 1712(AGS), 1999 WL 135204, at \*4 (S.D.N.Y. Mar. 11, 1999) (stating that "[t]oday, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation"); DiLaurenzio v. Atl. Paratrans, Inc., 926 F. Supp. 310, 314 (E.D.N.Y. 1996) (holding that a determination of whether a hostile work environment exists is often not "susceptible of summary resolution"). See also Beiner, *supra* note 130, at 95; Kahan & Deem, *supra* note 14, at 1287 (noting that summary judgments are usually inappropriate in harassment suits); Marks, *supra* note 13, at 1447-49. But see Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985) (holding that summary judgment applies equally to employment discrimination cases as it does in any other area of the law).

236. Weinstein, *supra* note 9.

237. See Swinton v. Potomac Corp., 270 F.3d 794, 808 (9th Cir. 2001).

238. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (emphasizing the need to consider the social context in which allegedly harassing behavior may have occurred).

239. See ROSSEIN, *supra* note 14, § 6.7[3], at 6-65 to 6-66; Frank, *supra* note 14, at 494; Kahan & Deem, *supra* note 14, at 1271-76.

case based on racial harassment.<sup>240</sup> Consequently, judges and juries are left with even less guidance to aid them in determining what comprises a racially hostile work environment than they have in sexual harassment cases.

Daunted by the prospect of evaluating all of the circumstances, relationships, and expectations that comprise social context, some courts and commentators seek to narrow the interpretation of social context. In a recent law review article, Michael J. Frank, an attorney specializing in labor and employment law, suggested that the following comprise some of the leading interpretations: (1) public or private setting of the conduct; (2) the reasonable victim standard; (3) aggregation of incidents; (4) the social relationship between the harasser and the plaintiff; and (5) social context as workplace culture.<sup>241</sup> Each interpretation is not mutually exclusive and all have some claim to endorsement by the U.S. Supreme Court.<sup>242</sup> However, any attempt to restrict social context analysis to the immediate setting, relationships, or individuals involved fails to adequately consider the larger social and historical setting which places human communications into context. Racial harassment carries subtle nuances that garner meaning far beyond the immediate circumstances and environment in which it occurs. Thus, legal determinations of social context must incorporate some assessment of social and historical perspective to accurately determine what conduct is severe and pervasive racial harassment.

#### 1. Public and Private Setting of the Conduct

Some courts have interpreted “social context” to require a determination of whether harassing comments were made in the presence of the plaintiff’s coworkers. This interpretation assumes that humiliation is roughly proportional to the number of witnesses present<sup>243</sup> and hinges on whether an allegedly harassing interaction was public, and therefore social, or whether the exchange occurred privately.<sup>244</sup> For example, the U.S. Court of Appeals for the Fourth Circuit has held that the severity of

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240. See *Moore v. KUKA Welding Sys.*, 171 F.3d 1073, 1079 (6th Cir. 1999); *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 428–29 (7th Cir. 1995); Kahan & Deem, *supra* note 14, at 1268.

241. For a more detailed discussion, see Frank, *supra* note 14, at 451–64.

242. *Id.* at 451.

243. See, e.g., *EEOC v. R&R Ventures*, 244 F.3d 334, 340 (4th Cir. 2001); *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1414 (10th Cir. 1997).

244. See Frank, *supra* note 14, at 451.

harassing comments is increased if a plaintiff's coworkers are witnesses to them.<sup>245</sup>

In contrast, other courts have found that some comments are more harassing when made in an intimate setting than in public.<sup>246</sup> In general, evaluating whether the alleged harassment occurred in the presence of others may shed some light on the degree of humiliation suffered, and thus may indicate the degree to which the plaintiff may have suffered psychological injury or whether the plaintiff's job performance was affected. However, such analysis is inherently limited because it fails to measure the severity of the alleged harassment against larger social or historical meanings. Whether harassment is witnessed comprises one factor of many that can impact severity. A broader interpretation of social context was clearly anticipated by the plain language of the *Oncala* decision and is necessary to establish a more fair and accurate assessment of whether alleged harassment objectively created a hostile work environment.

## 2. Reasonable Victim Standard

A determination of whether discriminatory conduct is objectively and subjectively severe and pervasive is intrinsic to hostile work environment claims.<sup>247</sup> Evaluating whether a *reasonable person* would have felt that the allegedly harassing conduct created a hostile work environment appears objective on its face; however, many commentators have argued that this standard, which was developed and interpreted primarily by white men, ignores the perspectives of both women and ethnic minorities.<sup>248</sup> There is

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245. *Smith*, 129 F.3d at 1414 (finding that the plaintiff's humiliation was increased because the comments were made in an open office without partitions). *See also R&R Ventures*, 244 F.3d at 340 (holding that harassing comments were considered more severe in light of the fact that they were made in front of customers and the plaintiff's coworkers).

246. *See, e.g., Hathaway v. Runyon*, 132 F.3d 1214, 1225 (8th Cir. 1997) (noting that the plaintiff felt threatened when two alleged harassers cornered her in a small private room); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995) ("Remarks innocuous or merely mildly offensive when delivered in a public setting might acquire a sinister cast when delivered in the suggestive isolation of a hotel room.").

247. *See* discussion *supra* Part IV.B.

248. *See* ROSSEIN, *supra* note 14, § 6.7[2][a], at 6-55 (discussing the reasonable woman standard); Frank, *supra* note 14, at 454. *See also* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 21-22 (1998). Bender argues that although the "reasonable man standard" was originally intended to be gender-neutral, "used in the generic sense to mean person or human being," it took on a male-centric perspective because when it was applied in treatises, cases, or casebooks, it was written about or by men. *Id.* She further contends that even after the standard was renamed "the reasonable person standard," it still represented what was reasonable from the masculine perspective of the mostly male legal community or even the female attorney trained to think as a man. *Id.* at 23. *See*

a risk that the reasonable person standard allows America's white majority to define gender and racial issues for a polyethnic nation.<sup>249</sup> This possibility is particularly ominous in light of the fact that many whites may not be aware that certain remarks or behavior are offensive to most ethnic minorities.<sup>250</sup> In fact, whites often view racist behavior in the workplace as "isolated pranks," while targeted minorities view the incidents as much more serious.<sup>251</sup> For example, at Stanford, white students and faculty were inclined to view the black Beethoven poster as a foolish prank,<sup>252</sup> while to many African-Americans, the event comprised a racist attack.<sup>253</sup> For these reasons, many commentators have suggested that a legal standard that presents the white perspective as that of "the reasonable 'person' might turn out to [foster] the very stereotypical views that Title VII is designed to outlaw in the workplace."<sup>254</sup> Attempting to alleviate this risk, some courts and commentators have suggested that reasonableness should be assessed from the perspective of the reasonable minority.<sup>255</sup>

One benefit of the "reasonable victim" standard is that it explicitly incorporates minority perspectives into legal analysis. However, it is ultimately unlikely this reform would create a more fair and inclusive objective standard. First, instructing a judge or juror to view reasonableness from the standpoint of a reasonable victim may be asking for the impossible. How is a judge or juror, who most likely does not share the necessary characteristics or experiences, to adopt the perspective of a "reasonable woman or ethnic minority?"<sup>256</sup> Second, assessing reasonableness from a gender- or ethnic-specific perspective might undermine the purpose of an objective standard. What society deems

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also GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 26-28 (1985); Martha Minow, *The Supreme Court, 1986 Term—Forward: Justice Engendered*, 101 HARV. L. REV. 10, 58 (1987).

249. See Frank, *supra* note 14, at 455-56. See also *Brennan v. Metro. Opera Ass'n*, 192 F.3d 310, 321 (2d Cir. 1999) (Newman, J., concurring in part and dissenting in part) (discussing the risk that a reasonable person test will permit the majority's perspective to dominate race and gender issues).

250. See *Brennan*, 192 F.3d at 321.

251. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2327 (1989). Matsuda argues that the tendency for nontarget-group members to minimize racial incidents such as hate speech is a "defensive reaction" denying that real people, "just like us," are racist. *Id.*

252. See *supra* notes 110-15 and accompanying text (discussing Stanford University's Ujamaa incident).

253. See Lawrence, *supra* note 110, at 8-9.

254. Frank, *supra* note 14, at 456 (quoting *Brennan v. Metro. Opera Ass'n*, 192 F.3d 310, 321 (2d Cir. 1999) (Newman, J., concurring in part and dissenting in part)).

255. See *id.*; Kahan & Deem, *supra* note 14, at 1246.

256. See Frank, *supra* note 14, at 456.

reasonable may not be better represented by a standard that restricts its analysis of what is reasonable to a “black man, age thirty-three, who grew up in an inner-city home, but who worked his way through school and up the corporate ladder.” Thus, the reasonable victim standard mimics the problems exhibited by the reasonable person standard. An objective standard that restricts its evaluation of what is reasonable to the perspective of a single ethnic group or gender may not satisfactorily represent what is considered reasonable by American society at large. Rather, a truly objective legal standard should reflect in the aggregate the diverse perspectives of America’s polyethnic citizenry.

The proverbial slippery slope is another potential problem with the application of a reasonable minority standard. Recent commentators have observed that once the courts begin to recognize different standards, there is no logical basis by which to limit the potentially innumerable variations.<sup>257</sup> Frank asserts that if the “reasonable woman” or the “reasonable black man” is legally cognizable, then why not the “reasonable, wealthy, black, homosexual man” or even the “reasonable person raised in a religious home where even mild profanity is considered egregious.”<sup>258</sup> One might argue that while it is true that perspective is shaped by an infinite number of factors, an objective standard that incorporates too many of a plaintiff’s individualized characteristics runs the risk of becoming inherently subjective.

Finally, while a reasonable victim standard is perhaps the most direct method of injecting the experiences of ethnic minorities into legal analysis, its approach is too narrow. The U.S. Supreme Court instructed that “[t]he real social impact of workplace behavior often depends on a constellation of *surrounding circumstances, expectations, and relationships* which are not fully captured by a simple recitation of the words used or the physical acts performed.”<sup>259</sup> Thus, the Court concluded, common sense and an appropriate sensitivity to social context are critical to correctly assessing the objective severity of harassment from the perspective of the reasonable person in the plaintiff’s position.<sup>260</sup> Although the reasonable victim standard incorporates the life experiences and perspectives of America’s ethnic minorities into the determination of what is objectively severe harassment, which is vitally important, a subjective standard aids little to determine when conduct is harassing.

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257. *See id.* at 458.

258. *Id.*

259. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998) (emphasis added).

260. *Id.* at 81.

### 3. The Social Relationship Between the Harasser and the Plaintiff

Under the “reasonable victim” interpretation of social context, courts consider the relationship between the plaintiff and the alleged harasser to evaluate whether the relevant conduct or comments were unwelcome.<sup>261</sup> Therefore, whether the plaintiff and the alleged harasser were friends, enemies, or lovers may shed light on the meaning of the disputed behavior and whether it was intended to offend. Frank offers the following hypothetical:

Take for example, two friends who frequently swap dirty jokes. Their friendship would be highly relevant to showing that the jokes were welcome and inoffensive. Two friends who jokingly call each other names do not create the level of offensiveness that arises from two workplace enemies who bandy about the same expressions with a hostile intent.<sup>262</sup>

In general, evaluating the social relationship of the plaintiff and the alleged harasser will likely be most relevant in cases involving sexual harassment. As described above, however, this analysis may also prove useful in distinguishing between innocent, reciprocal teasing and discriminatory racial joking. In fact, interpreting the meaning of racial jokes usually requires a similar assessment of the relationship between the person who told the joke and that person’s audience.<sup>263</sup> Ultimately, this interpretation of social context closely parallels the express language of the *Oncala* decision and could potentially be an important tool to deciphering the meaning of allegedly harassing behavior.

### 4. An Aggregation of Incidents

Another possible interpretation of social context is that a pattern of harassing incidents should be considered in the aggregate, rather than as independent and isolated events. In *Jackson v. Quanex Corp.*, the U.S. Court of Appeals for the Sixth Circuit espoused this interpretation when it overruled a district court’s narrow interpretation of “totality of the circumstances.”<sup>264</sup> The court stated:

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261. In sexual harassment cases, most courts require the plaintiff to prove the sexual attention was unwelcome. See Kahan & Deem, *supra* note 14, at 1241–43. However, evidence that the allegedly harassing behavior was unwelcome is generally not required in racial harassment cases, as courts usually assume that racially insulting comments and behavior are unwelcome. See *supra* Part IV.B.

262. Frank, *supra* note 14, at 459.

263. DAVIES, *supra* note 4, at 4–5.

264. *Jackson v. Quanex Corp.*, 191 F.3d 647, 661 (6th Cir. 1999).

[W]e recently observed that when a lower court disaggregates the claims of a plaintiff alleging a hostile work environment, contrary to the “totality of circumstances” approach, it robs the incidents of their cumulative effect, and “[o]f course, when the complaints are broken into their theoretical component parts, each claim is more easily dismissed.”<sup>265</sup>

In this case, the district court had excluded from evidence all incidents of racial and sexual harassment established by the plaintiff, Linda Jackson, on the grounds that (1) the incidents were not directed at Jackson or did not occur in her presence; (2) the incidents did not involve overtly racial overtones; or (3) the incidents were so commonplace at the defendant’s workplace that they became “conventional conditions on the factory floor.”<sup>266</sup> Sharply rejecting this narrow approach, the court of appeals stated that “in the usual case an isolated offensive incident does not create an abusive or intimidating environment. However, by viewing each incident in isolation, as if nothing else had occurred, a realistic picture of the work environment was not presented.”<sup>267</sup>

In hostile work environment cases based on racial jokes and other forms of intangible discrimination, it is vital that the courts examine the various claims of harassment in the aggregate. As the U.S. Supreme Court noted in *Meritor Savings and Harris*, the “‘mere utterance of an . . . epithet which engenders offensive feelings in an employee’ does not sufficiently affect the conditions of employment to implicate Title VII.”<sup>268</sup> However, “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ Title VII is violated.”<sup>269</sup> Therefore, hostile work environment analysis necessitates a determination of whether a pattern of harassing incidents, viewed as a whole, is sufficient to create an objectively abusive work environment.

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265. *Id.* at 660 (quoting *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 562 (6th Cir. 1999)). *See also* *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998) (stating that recognizing a plaintiff’s heightened sensitivity due to the totality of the circumstances could require standards “higher than those of the street”); *Kahan & Deem*, *supra* note 14, at 1252 (emphasizing the need to look at instances of harassing conduct as a whole).

266. *Jackson*, 191 F.3d at 659.

267. *King v. Hillen*, 21 F.3d 1572, 1581 (Fed. Cir. 1994).

268. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (alterations in original) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

269. *Harris*, 510 U.S. at 21 (alterations in original) (quoting *Meritor Sav. Bank*, 477 U.S. at 65).

## 5. Beyond the Workplace: A Critique of the Coarseness Factor

Frank asserts that harassment, severity, and unwelcome behavior should be examined in light of the general culture of the defendant's workplace.<sup>270</sup> Therefore, under the rubric of "cultural context," legal assessment of a hostile work environment claim takes into consideration the extent to which the workplace culture is permeated with vulgarity, sexual and racial banter, or harsh language as indicative of whether the alleged harassment extended beyond the realm of what was acceptable at the defendant's workplace.<sup>271</sup> Consequently, racial joking that might be considered shocking, offensive, and abusive in the corporate setting might be viewed as commonplace on the factory floor.<sup>272</sup>

Proponents of this standard view the U.S. Supreme Court's assertion that "[w]ords that are commonplace in one setting are shocking in another"<sup>273</sup> as an endorsement. Some courts justify the adoption of the coarseness factor as necessary to preclude the use of hostile work environment to enforce standards of etiquette in workplaces.<sup>274</sup> Furthermore, they argue that consideration of the coarseness of the defendant's workplace is in line with Scalia's argument in *Oncale* that the ultimate meaning of language and conduct cannot be determined in isolation, but must be drawn from the "social context in which [the] particular behavior occur[red]."<sup>275</sup> While technically true, establishing

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270. See Frank, *supra* note 14, at 464; Brannan, *supra* note 129, at 795–808.

271. See Frank, *supra* note 14, at 464.

272. In *Rabidue v. Osceola Refining Co.*, the U.S. Court of Appeals for the Sixth Circuit concluded that the plaintiff's sexual harassment claim failed because she had voluntarily chosen to work in an environment where sexual joking and innuendo was tolerated. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620–21 (6th Cir. 1986), *overruled on other grounds by Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). The *Rabidue* court considered such factors as the plaintiff's background and experiences, her coworkers and supervisors, the totality of the physical environment, the "lexicon of obscenity" both before and after the plaintiff began work, and her reasonable expectation on voluntarily accepting employment in the environment. See *Rabidue*, 805 F.2d at 620–21. See also ROSSEIN, *supra* note 14, § 6.7, at 6–41. *But see* Smith v. Sheahan, 189 F.3d 529, 534–35 (7th Cir. 1999) (rejecting the *Rabidue* reasoning as discounting the seriousness of harassing conduct because the plaintiff "voluntarily" began work in "an aggressive setting").

273. Frank, *supra* note 14, at 465 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978)).

274. See, e.g., *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir. 1995) (proclaiming that a less rigorous standard of liability would attempt to protect women from everyday insults "as if they remained models of Victorian reticence"); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 562 (4th Cir. 1987) (holding that bad manners, rude behavior, and hurt feelings do not sufficiently support a claim for emotional distress and reasoning that "[t]he workplace is not a Victorian parlor, and the courts are not the arbiters of its etiquette").

275. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998); *Deal v. United States*, 508 U.S. 129, 132 (1993). See also ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 37 (Amy Gutmann ed., 1997) ("In textual interpretation, context is everything . . .").

standards of objective severity that fluctuate depending on the refinement of particular employees runs counter to the goals of Title VII.<sup>276</sup>

A major flaw of workplace culture analysis is that the more abusive the work environment, the harder it is for a Title VII plaintiff to prove that harassing conduct was sufficiently severe or pervasive to create a hostile work environment.<sup>277</sup> Some courts have observed that allowing greater tolerance for a workplace where discriminatory conduct is prevalent violates the principles of Title VII and Congress' intent to "liberate the workplace from the demeaning influence of discrimination, and thereby implement the goals of human dignity and economic equality in employment."<sup>278</sup> Rather than lowering the threshold of what constitutes actionable harassment, a work environment where racial jokes and slurs are "part of the everyday banter on the shop floor" should provide ample evidence from which a judge or a jury can find a workplace was racially hostile.<sup>279</sup>

In addition, defining harassment in light of what conduct is tolerated within the employer's workplace creates a needlessly diminutive and artificial standard. As one court ventured, Title VII was not intended to allow for the promulgation of a community's individual prejudices within the workplace, but rather to oust discrimination and harassment from America's various work environments.<sup>280</sup> Furthermore, harassing conduct is historically and socially defined. Insults of a racial and sexual nature may be more common in a blue-collar setting, and therefore would theoretically be less shocking. However, a greater prevalence of racial joking does not anesthetize its targets from racist messages. For example, one court has stated in regards to "nigger" that "[n]o word in the English

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276. See Brannan, *supra* note 129, at 827.

277. *Id.* See also Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999); Jackson v. Qualex Corp., 191 F.3d 647, 662 (6th Cir. 1999) (stating that the district court rejected the plaintiff's hostile work environment claims because the conduct of which the plaintiff complained was ubiquitous in the defendant's workplace).

278. See, e.g., King v. Hillen, 21 F.3d 1572, 1582 (Fed. Cir. 1994); Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990) ("[W]hile Title VII does not require that an employer fire all 'Archie Bunkers' in its employ, the law does require that the employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their coworkers.") (alteration in original) (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 350 (6th Cir. 1988)).

279. See Jackson, 191 F.3d at 662.

280. Smith v. Sheahan, 189 F.3d 529, 534-35 (7th Cir. 1999).

Employers who tolerate workplaces marred by exclusionary practices and bigoted attitudes cannot use their discriminatory pasts to shield them from the present-day mandate of Title VII. There is no assumption-of-risk defense to charges of workplace discrimination.

*Id.* See also ROSSEIN, *supra* note 14, § 6.7[2], at 6-51 (discussing the Smith holding).

language is more odious or loaded with as terrible a history”;<sup>281</sup> however, it has been noted that in some connotations, its use may be positive or even affirming.<sup>282</sup> Likewise, determining whether racial jokes convey racial animosity usually requires consideration of the social context in which the jokes are told.<sup>283</sup> In this respect, evaluation of the social context in which the word is used may be useful in distinguishing between affirmative and discriminatory uses of this slur.<sup>284</sup> However, when racial jokes are used in a derogatory and discriminatory manner, the frequency of their use heightens the severity and pervasiveness of the harassment.

Similarly, as discussed in Part III, racial jokes assume a variety of uses and functions that vary widely depending on the context in which they are used.<sup>285</sup> A joke can become a vicious weapon when used to enforce notions of inferiority and hierarchy,<sup>286</sup> but it can also express neutral, even amiable messages.<sup>287</sup> At Potomac Corporation, Swinton was the only African-American employee out of 140, but African-Americans were not the only minority group ridiculed by the jokes that flew around the factory floor.<sup>288</sup> The jokes told in Swinton’s presence disparaged African-Americans and conveyed racism and ethnic hostility. Recall, for example, the following joke: “Did you ever see a black man on ‘The Jetsons’? Isn’t it beautiful what the future looks like?”<sup>289</sup> The unmistakable message of this joke is that the world would be a better place if African-Americans were not in it. Given the context in which it was told and the relationships of the parties, it is hard to imagine an innocuous interpretation. However, if the U.S. Court of Appeals for the Ninth Circuit had evaluated Swinton’s harassment claim under the rubric of the “coarseness factor,” it might have concluded that the racial jokes Swinton endured were no more severe or pervasive than those told about other ethnic groups.<sup>290</sup> As it is, the court of appeals wryly rejected this

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281. See *Daso v. Grafton Sch., Inc.*, 181 F. Supp. 2d 485, 493 (D. Md. 2002).

282. See *WATKINS*, *supra* note 1, at 131–32.

283. See *DAVIES*, *supra* note 4, at 4.

284. One possible shortcut is to note whether the person using the term is of African-American descent.

285. See *supra* Part III.

286. See *HUMOR AND SOCIAL CHANGE*, *supra* note 3, at 28.

287. See *DAVIES*, *supra* note 4, at 9.

288. *Swinton v. Potomac Corp.*, 270 F.3d 794, 800 (9th Cir. 2001).

289. *Id.* at 799.

290. See *id.* at 807. In *Smith v. Sheahan*, 189 F.3d 529, 534 (7th Cir. 1999), the court observed: Under this logic, an African-American worker in an otherwise all-white workplace in an area with a history of race discrimination would have to withstand a heightened degree of race-based abuse before he could bring an actionable claim than the same worker in a setting with a greater tradition of interracial tolerance.

proposition: “To suggest, as Potomac does, that it might escape liability because it equally harassed whites and blacks would give new meaning to equal opportunity.”<sup>291</sup> Using the defendant’s workplace as a yardstick against which a plaintiff’s racial harassment claims are measured is tautological at best, as the particular prejudices exhibited within the defendant’s workplace are enshrined as a model of objective reasonability.

There is also a significant risk that if harassment is evaluated in light of what types of conduct and remarks are tolerated within a workplace, the perspectives of the white male majority will be further entrenched as the benchmark of what is legally reasonable. For example, of the 140 employees working in Potomac’s shipping department, Swinton was the only African-American.<sup>292</sup> Although the exact ethnic breakdown of these employees is unclear, presumably the majority were white men. Furthermore, as generally only those who enjoy a high degree of social status and security within the workplace publicly ridicule their fellow coworkers, an assessment of racial joking in a particular workplace usually focuses on those jokes told by employees who are members of the majority group.<sup>293</sup> Thus, if the court of appeals had assessed the level of racial joking exhibited at Potomac’s shipping department as a threshold of reasonably inoffensive conduct, it would have designated the prejudiced perspective of Potomac’s white male employees as objectively reasonable.

#### E. SOCIAL CONTEXT: INTRODUCING A HISTORICAL AND SOCIAL PERSPECTIVE

The breadth of Justice Scalia’s instruction that hostile work environment analysis be considered from the “perspective of a reasonable person in the plaintiff’s position, considering ‘all of the circumstances’”<sup>294</sup> is daunting. The prospect of interpreting not only the actual words and behavior on which a harassment claim is based, but all of the circumstances, relationships, and expectations which influence the ultimate social impact requires intensive scrutiny. Therefore, it is not surprising that a number of courts have suggested a narrower interpretation of social context.<sup>295</sup> However, an expansive interpretation of social context is not

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291. *Swinton*, 270 F.3d at 807.

292. *Id.* at 799.

293. See *WILSON*, *supra* note 78, at 194. For a more detailed discussion of jokes in the workplace and their social functions, see also *supra* Part III.

294. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

295. See *supra* Part IV (discussing the various interpretations of social context). See also Frank, *supra* note 14, at 451–66.

only necessary to more accurately and fairly assess hostile work environment claims, such an interpretation is clearly called for by the plain language of the *Oncale* opinion.<sup>296</sup>

Careful consideration of “all of the circumstances”<sup>297</sup> is especially critical for hostile work environment claims based on racial joking. Most Americans are aware of this country’s long history of racial discrimination. However, many are not aware of the role racial jokes have played in shaping modern race relations.<sup>298</sup> Furthermore, because jokes are more likely to be considered innocuous or merely offensive than other types of racial harassment,<sup>299</sup> it is important that a judicial decision-maker be aware of the role racial jokes have played throughout American history in communicating and perpetuating racism and discrimination. Similarly, it is also essential that a judge or jury be sensitive to the significant impact hostile racial joking can have on the psychological well-being of its victims.<sup>300</sup> This is not to suggest that the utterance of a few isolated racial jokes on the factory floor automatically creates an abusive working environment. The guiding principles of hostile work analysis clearly dictate that Title VII is violated when racial harassment is severe or pervasive enough to create an objectively hostile work environment.<sup>301</sup> However, perception remains a central problem to the consistent recognition of racial jokes in the workplace as discrimination. Thus, an “appropriate sensitivity” to all of the circumstances in which behavior occurs and is experienced by its target requires that courts and juries consider not only the immediate surrounding circumstances, but “peer through the looking glass”<sup>302</sup> to recognize patterns of conduct, social

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296. See *Oncale*, 523 U.S. at 81–82 (“The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”).

297. *Id.* at 81.

298. See *supra* Parts II and III. For a more detailed discussion on the role that racial jokes have played in our culture throughout history, see HUMOR AND SOCIAL CHANGE, *supra* note 3, at 27–43; REBELLIOUS LAUGHTER, *supra* note 7, at 38–48; WILSON, *supra* note 78, at 217–20; Boskin & Dorinson, *supra* note 31, at 100–17; *History and Humor*, *supra* note 94, at 20–22.

299. See *supra* Part III for a discussion of the social functions of jokes.

300. See *supra* Part III for a more complete discussion of the psychological effects racial jokes have on their targets.

301. See *supra* note 135 and accompanying text.

302. See LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING-GLASS 113 (Bantam Books 1981) (1871). Explaining her ideas about the Looking-Glass House, Alice stated, “First, there’s the room you can see through the glass—that’s just the same as our drawing-room, only the things go the other way.” *Id.* at 112. Similarly, a judge or jury may be required to peer into the world of the plaintiff to properly decide whether a hostile work environment claim meets the reasonable person standard.

relationships, and America's history of racial discrimination to adequately interpret hostile work environment claims.

## V. CONCLUSION

Due to the amorphous fact patterns assumed by hostile work environment claims, the standards governing what constitutes a racially hostile environment must remain inherently vague. As a result, a certain amount of unpredictability may be unavoidable. Consequently, it is essential that the lower courts follow the U.S. Supreme Court's language in *Harris* and *Oncale* and consider *all* of the circumstances surrounding a claim of racial harassment.<sup>303</sup> Social context should not be restricted to an assessment of reasonableness from the perspective of a specific ethnic group. Nor should social context be confined to an evaluation of whether the alleged harassing conduct exhibited a degree of severity above what was common to the defendant's work environment. Both approaches create a needlessly artificial objective standard and fail to represent in the aggregate the diverse perspectives of America's polyethnic citizenry. Rather, social context must include not only a consideration of the "constellation of surrounding circumstances, expectations, and relationships" and an appropriate sensitivity to the race and gender of the involved parties,<sup>304</sup> but also an understanding of the historical role racial jokes have played in establishing American race relations and their ability to impart psychological injury. This broader perspective of social context, when paired with "common sense,"<sup>305</sup> will best assist courts and juries in distinguishing between friendly teasing and racial harassment and ensure that discriminatory racial joking in the workplace is not "a laughing matter."<sup>306</sup>

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303. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

304. *Oncale*, 523 U.S. at 82.

305. See *id.*

306. *Swinton v. Potomac Corp.*, 270 F.3d 794, 799 (9th Cir. 2001).